(27,082)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 358.

SILVERTHORNE LUMBER COMPANY, INC., AND FREDERICK W. SILVERTHORNE, INDIVIDUALLY AND AS PRESIDENT OF THE SILVERTHORNE LUMBER COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

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1 In the District Court of the United States of America for the Western District of New York.

At a Special Term of the District Court of the United States of America in and for the Western District of New York, begun and held at the United States Court-rooms, in the Federal Building, in the City of Buffalo, within and for the District aforesaid, on the third day of February, in the year of our Lord one thousand nine hundred and nineteen, before Honorable John R. Hazel, Judge of said Court.

WESTERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America within and for the district aforesaid, then and there sworn, and charged to inquire for the said United States of America and for the body of said district, do upon their oath, present that the president of the United States of America, under and by virtue of the powers vested in him by the joint resolution of the Senate and House of Representatives of the United States bearing date of April 6, 1917, concerning the existence of a state of war between the United States and the Imperial German Government, by the joint resolution of the Senate and House of Representatives of the United States bearing date of December 7, 1917, concerning the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government, under and by virtue of Section I of the Act of Congress approved August 29, 1916, entitled "An Act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes" empowering the President, through the

2 Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion so far as might be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency of war as might be needful and desirable, and by virtue of all other powers thereto him enabling did, by his proclamation dated December 26, 1917, through Newton D. Baker, Secretary of War, at 12 o'clock noon on the 28th day of December, 1917, take possession and assume control of each and every system of railroad transportation and the appurtenances thereof, within the boundaries of the Continental United States, engaged in general transportation, including terminals, and all other equipment and appurtenances commonly used upon or operated as a part of said systems of transportation, including the railroad and railroad system in this indictment hereafter mentioned, to the end that said systems of transportation should be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion, so far as should be necessary, of all traffic thereon; and that the President, in said

proclamation, directed that the possession, control, operation and utilization of such transportation systems by him in said proclamation undertaken should be exercised by and through William G. McAdoo, who was by said proclamation duly appointed and duly designated Director General of Railroads.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that, to wit, from December 28, 1917 to January 10, 1919, the possession, control, operation and utilization of the Lehigh Valley Railroad, a railroad and transportation system extending from Buffalo aforesaid to Jersey City in the State of New Jersey, has been exercised by and through the said William G. McAdoo, Director General of Railroads, as aforesaid, and from January 10, 1919, to the date of the finding and return of this indictment by Walker D. Hines, who was duly appointed Director General of Railroads in the place and stead of the said William G. McAdoo, resigned, and that for the purposes connected with the emergencies of war, the said Lehigh Valley Railroad has transported among other commodities large quantities of grain in bulk in car load lots and that in order properly to safeguard the contents of said car loads of grain, the said railroad has installed grain doors in each of such cars to prevent leakage of grain therefrom.

3

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said William G. McAdoo as Director General of Railroads on July 1, 1918, duly appointed Edwin C. Mann a Federal Treasurer at Philadelphia, in the State of Pennsylvania, who duly qualified and has since held the office of Federal Treasurer aforesaid; that the said Edwin C. Mann, duly and in pursuance of his due authority and duties as Federal Treasurer, has duly and pursuant to lawful authority received from the said Lehigh Valley Railroad all of the moneys derived from its operation and has duly and pursuant to lawful authority disbursed therefrom the moneys required to discharge the obligations of the said Lehigh Valley Railroad in its capacity of Federal carrier from the said date of his appointment to the date of the finding and return of this indictment; that the said moneys so received and disbursed as aforesaid were the property of the United States.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said William G. McAdoo, Director General of Railroads as aforesaid, on December 29, 1917, appointed Horace J. McQuade, purchasing agent of the said Lehigh Valley Railroad with offices at the City of New York in the aforesaid State of New York, and that the said Horace J. McQuade, as purchasing agent of the said Lehigh Valley Railroad, on July 23, 1918, entered into a contract with one James W. McConkey, doing business under the trade name of Shingle Mills Selling Company, having its principal place of business at North Tonawanda in the said State of New York, and under and by the terms of said contract the said Lehigh Valley Railroad was obligated to purchase from said Shingle Mills Selling Company one million feet of grain door boards at twenty-eight dollars for each thousand feet, board measure, and to be paid for out of funds of the United States in the possession of said

4

Edwin C. Mann, Federal Treasurer, and the said Shingle Mills Selling Company was obliged to sell the grain door boards specified to the said Lehigh Valley Railroad and to deliver them at its yards at Tifft Farm in the said City of Buffalo.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that from July 1, 1918 to the date of the finding and return of this indictment, Silverthorne Lumber Company, Inc., has been a corporation organized and existing under and by virtue of the laws of the said State of New York, having its principal office at North Tonawanda in the said State and in said district; that one Frederick W. Silverthorne has been the president of said corporation and one Asa K. Silverthorne its general manager, and that one Egbert B. Woodworth has been the foreman of the said Lehigh Valley Railroad's lumber yard at Tifft Farm in the city of Buffalo aforesaid, known and described as coopering tracks of the said Lehigh Valley Railroad.

5 And the grand jurors aforesaid, upon their oath aforesaid, do further present that Asa K. Silverthorne aforesaid, said Frederick W. Silverthorne, said Egbert B. Woodworth, each late of the city of Buffalo, said James W. McConkey, and said Silverthorne Lumber Company, Inc., herein indicted, at Buffalo in said district and within the jurisdiction of this court, on July 1, 1918, unlawfully and feloniously did conspire, combine, confederate and agree together and with divers other persons to the grand jurors unknown, to defraud the United States of divers large sums of money by fraudulently procuring from said Edwin C. Mann, Federal Treasurer, divers large sums of money—the property of the United States, as and for the payment for certain grain door boards which they and each of them falsely and fraudulently represented to said Edwin C. Mann had been delivered pursuant to said contract to the said Lehigh Valley Railroad at Buffalo aforesaid, when as said Asa K. Silverthorne, said Frederick W. Silverthorne, said Egbert B. Woodworth, said James W. McConkey and said Silverthorne Lumber Company, Inc. and each of them, to wit, well knew, that said grain door boards had not in fact been so delivered to the said Lehigh Valley Railroad at Buffalo, or at any other place; and said unlawful and felonious conspiracy, combination, confederation and agreement has at all times since the said July 1, 1918 been furthered and continued in force by each of said conspirators.

Overt Acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that to effect the object of the unlawful and felonious conspiracy, combination, confederation and agreement, said Asa K. Silverthorne, said Frederick W. Silverthorne, said Egbert B. Woodworth, said James W. McConkey and the said Silverthorne

6 Lumber Company, Inc., at the several times in that behalf hereinafter mentioned, did do certain acts, that is to say:

1. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey,

in pursuance of said contract between said Shingle Mills Selling Company and said Lehigh Valley Railroad, on October 25, 1918, at the yards of the said Silverthorne Lumber Company, Inc. did cause grain door boards to be loaded into a car bearing the initials D. L. & W. and the number 31374; and billed, consigned and caused said car containing grain door boards to be delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo on October 28, 1918.

2. Said Asa K. Silverthorne and said Egbert B. Woodworth prior to October 25, 1918, in said city of Buffalo, entered into a corrupt agreement whereby said Egbert B. Woodworth, in consideration of payments of money to him by said Asa K. Silverthorne, from time to time thereafter and in sums and at times to the grand jurors unknown, did in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman hereinbefore described, on November 2, 1918, make entries in the records of the said Lehigh Valley Railroad as to the quantity of grain door boards received by the said Lehigh Valley Railroad in the car bearing the initials D. L. & W., and the number 31374, which was loaded, billed, consigned and delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo, by said Asa K. Silverthorne, said Frederick W. Silverthorne, said James W. McConkey and said Silverthorne Lumber Company, Inc., which entries so made in the records of the said Lehigh Valley Railroad by the said Egbert B. Woodworth were false and fraudulent, and
7 said Egbert B. Woodworth, in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman, hereinbefore described, did report to the said Lehigh Valley Railroad that said car bearing the initials D. L. & W. and the number 31374, when received at the coopering tracks of the said Lehigh Valley Railroad at Buffalo aforesaid, by the said Lehigh Valley Railroad, did contain 24637 feet of grain door boards and that said 24637 feet of grain door boards were in fact received by the said Lehigh Valley Railroad, which said report so made by the said Egbert B. Woodworth was false and fraudulent.

3. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, did falsely and fraudulently prepare and did present a bill and invoice for said car bearing the initials D. L. & W. and the number 31374 to the said Lehigh Valley Railroad for 24637 feet of grain door boards at twenty-eight dollars per thousand feet, totaling six hundred eighty-nine dollars eighty-four cents, for payment by the said Edwin C. Mann, Federal Treasurer.

4. Said Shingle Mills Selling Company did receive from said Edwin C. Mann, Federal Treasurer, on November 13, 1918, the sum of $689.84, less one per cent discount.

5. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, in pursuance of said contract between said Shingle Mills Selling Company and said Lehigh Valley Railroad, on October 25, 1918, at the

yards of the said Silverthorne Lumber Company, Inc., did cause grain door boards to be loaded into a car bearing the name
8 Erie, and the number 105593; and billed, consigned and caused said car containing grain door boards to be delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo on October 28, 1918.

6. Said Asa K. Silverthorne, and said Egbert B. Woodworth prior to October 25, 1918, in said city of Buffalo, entered into a corrupt agreement whereby said Egbert B. Woodworth, in consideration of payments of money to him by said Asa K. Silverthorne, from time to time thereafter and in sums and at times to the grand jurors unknown, did in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman hereinbefore described, on November 2, 1918, make entries in the records of the said Lehigh Valley Railroad as to the quantity of grain door boards received by the said Lehigh Valley Railroad in the car bearing the name Erie, and the number 105593, which was loaded, billed, consigned and delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo, by said Asa K. Silverthorne, said Frederick W. Silverthorne, said James W. McConkey and said Silverthorne Lumber Company, Inc., which entries so made in the records of the said Lehigh Valley Railroad by the said Egbert B. Woodworth were false and fraudulent, and said Egbert B. Woodworth, in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman, hereinbefore described, did report to the said Lehigh Valley Railroad that said car bearing the name Erie and the number 105593, when received at the coopering tracks of the said Lehigh Valley Railroad at Buffalo aforesaid, by the said Lehigh Valley Railroad, did contain 25620 feet of grain door boards and that said 25620 feet of grain door boards were in fact received by the said Lehigh Valley Railroad, which said report so made by the said Egbert B. Woodworth was false and fraudulent.

9 7. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, did falsely and fraudulently, prepare and did present a bill and invoice for said car bearing the name Erie and the number 105593 to the said Lehigh Valley Railroad for 26491 feet of grain door boards at twenty-eight dollars per thousand feet, totaling $741.75 for payment by the said Edwin C. Mann, Federal Treasurer.

8. Said Shingle Mills Selling Company did receive from said Edwin C. Mann, Federal Treasurer, on November 13, 1918, the sum of $741.75, less one per cent discount.

9. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, in pursuance of said contract between said Shingle Mills Selling Company and said Lehigh Valley Railroad, on October 17, 1918, at the yards of the said Silverthorne Lumber Company, Inc., did cause grain door boards to be loaded into a car bearing the initials L. & N.

and the number 48294; and billed, consigned and caused said car containing grain door boards to be delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo on October 23, 1918.

10. Said Asa K. Silverthorne and said Egbert B. Woodworth prior to October 17, 1918, in said city of Buffalo, entered into a corrupt agreement whereby said Egbert B. Woodworth, in consideration of payments of money to him by said Asa K. Silverthorne, from time to time thereafter and in sums and at times to the grand jurors unknown, did in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman hereinbefore described, on October 25, 1918, make entries in the records of the said Lehigh Valley Railroad as to the quantity of grain door boards received by the said Lehigh Valley Railroad in the car bearing the initials L. & N. and the number 48294, which was loaded, billed, consigned and delivered to
10 the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo, by said Asa K. Silverthorne, said Frederick W. Silverthorne, said James W. McConkey and said Silverthorne Lumber Company, Inc., which entries so made in the records of the said Lehigh Valley Railroad by the said Egbert B. Woodworth, were false and fraudulent, and said Egbert B. Woodworth in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman, hereinbefore described, did report to the said Lehigh Valley Railroad that said car bearing the initials L. & N. and the number 48294, when received at the coopering tracks of the said Lehigh Valley Railroad at Buffalo aforesaid, by the said Lehigh Valley Railroad, did contain 22300 feet of grain door boards and that said 22300 feet of grain door boards were in fact received by the said Lehigh Valley Railroad, which said report so made by the said Egbert B. Woodworth was false and fraudulent.

11. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, did falsely and fraudulently prepare and did present a bill and invoice for said car bearing the initials L. & N. and the number 48294 to the said Lehigh Valley Railroad for 22301 feet of grain door boards at twenty-eight dollars per thousand feet, totaling $624.43, for payment by the said Edwin C. Mann, Federal Treasurer.

12. Said Shingle Mills Selling Company did receive from said Edwin C. Mann, Federal Treasurer, on November 11, 1918, the sum of $624.43, less one per cent discount.

13. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc. and said James W. McConkey, in pursuance of said contract between said Shingle Mills Selling Company and said Lehigh Valley Railroad, on October 21, 1918, at the yards of the said Silverthorne Lumber Company, Inc., did cause grain door boards to be loaded into a car bearing the initials M. P.
11 and the number 20086; and billed, consigned and caused said car containing grain door boards to be delivered to the said

Lehigh Valley Railroad at Tifft Farm in the said City of Buffalo on October 23, 1918.

14. Said Asa K. Silverthorne and said Egbert B. Woodworth prior to October 21, 1918, in said city of Buffalo, entered into a corrupt agreement whereby said Egbert B. Woodworth, in consideration of payments of money to him by said Asa K. Silverthorne, from time to time thereafter and in sums and at times to the grand jurors unknown, did in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman hereinbefore described, on November 1, 1918, make entries in the records of the said Lehigh Valley Railroad as to the quantity of grain door boards received by the said Lehigh Valley Railroad in the car bearing the initials M. P. and the number 20086, which was loaded, billed, consigned and delivered to the said Lehigh Valley Railroad at Tifft Farm in the said city of Buffalo, by said Asa K. Silverthorne, said Frederick W. Silverthorne, said James W. McConkey and said Silverthorne Lumber Company, Inc., which entries so made in the records of the said Lehigh Valley Railroad by the said Egbert B. Woodworth were false and fraudulent, and said Egbert B. Woodworth, in pursuance of said corrupt agreement and acting within the scope of his employment as such foreman and in his capacity as said foreman, hereinbefore described, did report to the said Lehigh Valley Railroad that said car bearing the initials M. P. and the number 20086, when received at the coopering tracks of the said Lehigh Valley Railroad at Buffalo aforesaid, did
12 contain 22456 feet of grain door boards and that said 22456 feet of grain door boards were in fact received by the said Lehigh Valley Railroad, which said report so made by the said Egbert B. Woodworth was false and fraudulent.

15. Said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., and said James W. McConkey, did falsely and fraudulently prepare and did present a bill and invoice for said car bearing the initials M. P. and the number 20086 to the said Lehigh Valley Railroad for 22435 feet of grain door boards at twenty-eight dollars per thousand feet, totaling $628.18, for payment by the said Edwin C. Mann, Federal Treasurer.

16. Said Shingle Mills Selling Company did receive from said Edwin C. Mann, Federal Treasurer, on Novemmber 11, 1918, the sum of $628.18, less one per cent discount.

Conclusion.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Asa K. Silverthorne, said Frederick W. Silverthorne, said Silverthorne Lumber Company, Inc., said James W. McConkey and said Egbert B. Woodworth, at the time and place and in manner and form aforesaid did conspire to defraud the United States in a certain manner and each of such parties did do acts to effect the object of the conspiracy; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such

case made and provided. (Section 37, United States Criminal Code.)

STEPHEN T. LOCKWOOD,
Attorney of the United States in and for the Western District of New York.

13 District Court of the United States of America for the Western District of New York.

At a Stated Term of the District Court of the United States of America for the Western District of New York, begun and held at the Court-house, in the Federal Building, in the city of Buffalo, within and for the District aforesaid, on the eleventh day of March, in the year of our Lord, one thousand nine hundred and nineteen, before Honorable John R. Hazel, Judge of said Court.

WESTERN DISTRICT OF NEW YORK, *ss:*

The Grand jurors of the United States of America, within and for the District aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said District, do, upon their oath, present that the President of the United States of America, under and by virtue of the powers vested in him by the joint resolution of the Senate and House of Representatives of the United States, bearing date of April 6th, 1917, concerning the existence of a state of war between the United States and the Imperial German Government, by the joint resolution of the Senate and House of Representatives of the United States bearing date of December 7th, 1917, concerning the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government, under and by virtue of Section 1 of the Act of Congress, approved August 29th, 1916, entitled: "An Act making appropriations for the support of the army for the fiscal year ending June 30th, 1917, and for other purposes," empowering the President, through the Secretary of War, to take possession
14 and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion so far as might be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency of war as might be needful and desirable, and by virtue of all other powers thereto him enabling, did, by this Proclamation, dated December 26th, 1917, through Newton D. Baker, Secretary of War, at twelve o'clock noon on the 28th day of December, 1917, take possession and assume control of each and every system of railroad transportation and the appurtenances thereof, within the boundaries of the Continental United States engaged in general transportation, including terminals, and all other equipment and appurtenances, commonly used upon or operated as a part of said systems of transportation, including the railroad and railroad system in this indictment hereafter mentioned, to the end that said systems of transportation

should be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as should be necessary of all traffic thereon; and that the President in his said Proclamation directed that the possession, control, operation and utilization of such transportation systems by him in his said Proclamation undertaken should be exercised by and through William G. McAdoo, who was by said Proclamation duly appointed and duly designated Director General of Railroads.

And the grand jurors aforesaid, upon their oath as aforesaid, do further present that, to wit, from December 28th, 1917, to January 10th, 1919, the possession, control, operation and utilization
15 of the Erie Railroad, a railroad and transportation system extending from Buffalo aforesaid to Jersey City, in the State of New Jersey, has been exercised by and through the said William G. McAdoo, Director General of Railroads, as aforesaid, and from January 10th, 1919, to the date of the finding and return of this indictment by Walker D. Hines, who was duly appointed Director General of Railroads in the place and stead of the said William G. McAdoo, resigned, and that for the purposes connected with the emergencies of war, the said Erie Railroad has transported among other commodities large quantities of grain in bulk in car load lots and that in order properly to safeguard the contents of said car loads of grain, the said railroad has installed grain doors in each of such cars to prevent leakage of grain therefrom.

And the grand jurors aforesaid, upon their oath as aforesaid, do further present that the said William G. McAdoo, as Director General of Railroads, on December 29th, 1917, duly appointed Willard R. Collins Purchasing Agent of the said Erie Railroad, with offices in the City of New York in the aforesaid State of New York and the said Willard R. Collins duly qualified and has since held the office of Purchasing Agent aforesaid; that the said William G. McAdoo, as Director General of Railroads on August 1st, 1918, duly appointed Daniel W. Bigoney a Federal Treasurer at the city of New York aforesaid, who duly qualified and has since held the office of federal treasurer aforesaid; that the said Daniel W. Bigoney, duly and in pursuance of his authority and duties as Federal Treasurer, has duly and pursuant to lawful authority received from the said Erie Railroad all of the moneys derived from its operation and has duly and pursuant to lawful authority disbursed therefrom the moneys
16 required to discharge the obligations of the said Erie Railroad in its capacity of Federal carrier from said date of his appointment to the date of the finding and return of this indictment and that the said moneys so received and disbursed as aforesaid were the property of the United States.

And the grand jurors aforesaid, upon their oath as aforesaid, do further present that from August 1st, 1918, to the date of the finding and return of this indictment the Silverthorne Lumber Company, Inc., has been a corporation organized and existing under and by virtue of the laws of the said State of New York, having its principal office at North Tonawanda, in the said State and in said District; that one Frederick W. Silverthorne has been the President, one Asa

K. Silverthorne has been the General Manager, one Anthony W. Brick has been the Secretary and that one Walter H. Tobey has been the Vice President and Treasurer of said corporation, and that one Joseph W. Cannon has been the Foreman of the said Erie Railroad's cooperage and repair tracks in the city of Buffalo aforesaid.

And the graud jurors aforesaid, upon their oath as aforesaid, do further present that Asa K. Silverthorne aforesaid, said Frederick W. Silverthorne, said Anthony W. Brick, said Walter H. Tobey and said Joseph W. Cannon, each late of the City of Buffalo, and the said Silverthorne Lumber Company, Inc., herein indicted, at the city of Buffalo in the said District and within the jurisdiction of this Court, continuously from August 1st, 1918, to the date of the finding and presentation of this indictment, unlawfully and feloniously have conspired, combined, confederated and agreed together and with
17 divers other persons to the grand jurors aforesaid unknown, to defraud the United States of divers large sums of money by fraudulently procuring from said Daniel W. Bigoney, Federal Treasurer as aforesaid, divers large sums of money,—the property of the United States as and for the payment for certain grain door boards which they and each of them falsely and fraudulently represented to said Daniel W. Bigoney had been delivered to the said Erie Railroad at the city of Buffalo aforesaid, when the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Walter H. Tobey, said Anthony W. Brick, said Joseph W. Cannon, and said Silverthorne Lumber Company Inc., and each of them, to wit, well knew that said grain door boards had not in fact been delivered to the said Erie Railroad at the city of Buffalo aforesaid, or at any other place; that the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Walter H. Tobey, said Anthony W. Brick, said Joseph W. Cannon and said Silverthorne Lumber Company Inc., have conspired, combined, confederated and agreed together and with divers other persons to the grand jurors aforesaid unknown, to commit the offense aforesaid in the manner and by the means and device hereinafter described, to wit, that the said Asa K. Silverthorne on December 2nd, 1918, procured from the said Willard R. Collins, Purchasing Agent of the said Erie Railroad in the city of New York aforesaid, a contract, under and by the terms of which the said Erie Railroad was obligated to purchase from the said Silverthorne Lumber Company Inc., one million feet of grain door boards at thirty-three dollars for each thousand feet board measure to be paid for out of moneys of the United States in the possession of Daniel W. Bigoney, Federal Treas-
18 urer as aforesaid, and the said Silverthorne Lumber Company Inc., was obligated to sell the grain door boards specified in the said contract to the said Erie Railroad and to deliver them at the cooperage tracks of the said Erie Railroad in the said city of Buffalo; that thereafter the said Asa K. Silverthorne, said Frederick W. Silverthorne and said Anthony W. Brick, corruptly directed and instructed the loading and tally clerks of the said Silverthorne Lumber Company Inc., at its yards in North Tonawanda aforesaid to so load the cars delivered to the said Erie Railroad in pursuance of said contract that said cars would have the appearance of being fully

loaded with grain door boards when the said cars were in fact only partially loaded; and pursuant to instructions aforesaid of the said Asa K. Silverthorne, said Frederick W. Silverthorne and said Anthony W. Brick, the said cars of grain door boards in pursuance of said contract were only partially loaded by the said loading and tally clerks of the said Silverthorne Lumber Company Inc., and said cars did have the appearance of being fully loaded; that since August 1st, 1918, said Joseph W. Cannon, in violation of his duties to the said Erie Railroad did receive from said Asa K. Silverthorne memoranda of the footage said to have been contained in cars delivered to the said Erie Railroad in pursuance of said contract by the said Silverthorne Lumber Company Inc., and did in violation of his said duties as foreman of the said Erie Railroad accept the said memoranda as true and did report to the said Erie Railroad a much larger quantity of grain door boards as being loaded in said cars delivered to said Erie Railroad pursuant to said contract than was in fact loaded in the said cars when received by the said Erie Railroad; that
19 thereafter the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Walter H. Tobey, and said Silverthorne Lumber Company Inc. did make and present bills for payment to the said Daniel W. Bigoney, Federal Treasurer as aforesaid, who was duly authorized to approve and pay said bills, which said bills contained entries of a much greater number of feet of grain door boards than were in fact delivered to the said Erie Railroad pursuant to said contract by the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Walter H. Tobey and said Silverthorne Lumber Company Inc., and thereafter the said Daniel W. Bigoney, Federal Treasurer as aforesaid, did pay to the said Silverthorne Lumber Company Inc., out of the moneys of the United States, the bills so presented by the said Silverthorne Lumber Company Inc., less a discount of one-half of one per cent, including payment for the grain door boards fraudulently claimed by the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Walter H. Tobey and said Silverthorne Lumber Company Inc., to have been delivered to the said Erie Railroad pursuant to said contract but which in fact had not then and have not since been delivered to the said Erie Railroad.

Overt Acts.

And the grand jurors aforesaid, upon their oath as aforesaid, do further present that to effect the object of the unlawful and felonious conspiracy, combination, confederation and agreement, the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Anthony W. Brick, said Walter H. Tobey, said Joseph W. Cannon and the
20 said Silverthorne Lumber Company Inc., at the several times in that behalf hereinafter mentioned, did do certain acts, that is to say,—

1. Said Silverthorne Lumber Company, Inc., on January 30th, 1919, did make and present a bill to said Daniel W. Bigoney, Federal Treasurer as aforesaid, for the payment of 19409 feet of grain door boards at thirty-three dollars for each thousand feet, totaling

six hundred and forty dollars and fifty cents, represented by the said Silverthorne Lumber Company, Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to the said Daniel W. Bigoney, Federal Treasurer as aforesaid, to have been delivered to the said Erie Railroad in a car bearing the initials M. R. and the number 2042.

2. Said Silverthorne Lumber Company, Inc., on February 28th, 1919, did receive from said Daniel W. Bigoney, Federal Treasurer as aforesaid, the sum of six hundred and forty dollars and fifty cents less one-half of one per cent discount as and for payment of the grain door boards represented by the said Silverthorne Lumber Company, Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to have been delivered to the said Erie Railroad in a car bearing the initials M. R. and the number 2042.

3. Said Walter H. Tobey on February 28th, 1919, did sign as Treasurer of the said Silverthorne Lumber Company, Inc., a voucher check for four thousand four hundred and forty-eight dollars and forty-six cents, covering the payment of grain door boards delivered to said Erie Railroad and particularly grain door boards de-
21 livered to said Erie Railroad in a car bearing the initials "M. R." and the number "2042."

4. Said Joseph W. Cannon on February 3rd, 1919, did report to the said Erie Railroad at the City of Buffalo aforesaid that a car bearing the initials "M. R." and the number "2042" was received by the said Erie Railroad at the City of Buffalo aforesaid and that said car did contain 19409 feet of grain door boards, whereas in truth and in fact the said car did contain only 10020 feet of grain door boards.

5. Said Silverthorne Lumber Company, Inc., on February 3rd, 1919, did make and present a bill to said Daniel W. Bigoney, Federal Treasurer as aforesaid, for payment of 21323 feet of grain door boards at thirty-three dollars for each thousand feet, totaling seven hundred and three dollars and sixty-six cents, represented by the said Silverthorne Lumber Company, Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to the said Daniel W. Bigoney, Federal Treasurer as aforesaid, to have been delivered to said Erie Railroad in a car bearing the initials "C. M. & St. P." and the number "73716."

6. Said Silverthorne Lumber Company, Inc., on March 4th, 1919, did receive from the said Daniel W. Bigoney, Federal Treasurer as aforesaid, the sum of seven hundred and three dollars and sixty-six cents less one-half of one per cent discount as and for payment of the grain door boards represented by the said Silverthorne Lumber Company, Inc., said Asa K. Silverthorne, said
22 Frederick W. Silverthorne and said Walter H. Tobey to have been delivered to the said Erie Railroad in a car bearing the initials "C. M. & St. P." and the number "73716."

7. Said Walter H. Tobey on March 4th, 1919, did sign as Treasurer of the said Silverthorne Lumber Company, Inc., a voucher check for six thousand one hundred and thirty dollars and thirteen cents covering the payment of grain door boards delivered to said

Erie Railroad and particularly grain door boards delivered to said Erie Railroad in a car bearing the initials "C. M. & St. P." and the number "73716."

8. Said Joseph W. Cannon on February 6th, 1919, did report to the said Erie Railroad at the city of Buffalo aforesaid that a car bearing the initials "C. M. & St. P." and the number "73716" was received by the said Erie Railroad at the city of Buffalo aforesaid and that said car did contain 21323 feet of grain door boards whereas in truth and in fact said car did contain only 11683 feet of grain door boards.

9. Said Silverthorne Lumber Company Inc., on January 24th, 1919, did make and present a bill to said Daniel W. Bigoney, Federal Treasurer as aforesaid, for payment of 20,335 feet of grain door boards at thirty-three dollars for each thousand feet, totaling six hundred and seventy-one dollars and six cents, represented by the said Silverthorne Lumber Company Inc., said Asa K. Silverthorne,
23 said Frederick W. Silverthorne and said Walter H. Tobey to the said Daniel W. Bigoney, Federal Treasurer as aforesaid, to have been delivered to the said Erie Railroad in a car bearing the initials "S. P." and the number "33091."

10. Said Silverthorne Lumber Company Inc. on February 20th, 1919, did receive from said Daniel W. Bigoney, Federal Treasurer as aforesaid, the sum of six hundred and seventy-one dollars and six cents less one-half of one per cent discount as and for payment of the grain door boards represented by the said Silverthorne Lumber Company Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to have been delivered to the said Erie Railroad in a car bearing the initials "S. P." and the number "33091."

11. Said Walter H. Tobey on February 20th, 1919, did sign as Treasurer of the said Silverthorne Lumber Company, Inc., a voucher check for nine thousand seventy-nine dollars and seventy-one cents covering the payment of grain door boards delivered to the said Erie Railroad and particularly grain door boards delivered to said Erie Railroad in a car bearing the initials "S. P." and the number "33091."

12. Said Joseph W. Cannon on January 26th, 1919, did report to the said Erie Railroad at the city of Buffalo aforesaid, that a car bearing the initials "S. P." and the number "33091" was received by the said Erie Railroad at the city of Buffalo aforesaid and that said car did contain 20,335 feet of grain door boards whereas in truth and in fact said car did contain only 8,843 feet of grain door boards.

24 13. Said Silverthorne Lumber Company Inc. on January 25th, 1919, did make and present a bill to said Daniel W. Bigoney, Federal Treasurer as aforesaid, for payment of 21239 feet of grain door boards at thirty-three dollars for each thousand feet, totaling seven hundred dollars and eighty-nine cents represented by the said Silverthorne Lumber Company Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to the said Daniel W. Bigoney, Federal Treasurer as aforesaid, to

have been delivered to said Erie Railroad in a car bearing the initials "B & A" and the number "39575."

14. Said Silverthorne Lumber Company Inc. on February 24th, 1919, did receive from the said Daniel W. Bigoney, Federal Treasurer as aforesaid, the sum of seven hundred dollars and eighty-nine cents less one-half of one per cent discount as and for payment of the grain door boards represented by the said Silverthorne Lumber Company Inc., said Asa K. Silverthorne, said Frederick W. Silverthorne and said Walter H. Tobey to have been delivered to the said Erie Railroad in a car bearing the initials "B & A" and the number "39575."

15. Said Walter H. Tobey on February 24th, 1919, did sign as treasurer of the said Silverthorne Lumber Company Inc., a voucher check for four thousand five hundred and seventy-three dollars and twenty-three cents covering the payment of grain door boards delivered to said Erie Railroad and particularly grain door boards delivered to said Erie Railroad in a car bearing the initials "B & A" and the number "39575."

25 16. Said Joseph W. Cannon on January 27th, 1919, did report to the said Erie Railroad at the city of Buffalo aforesaid, that a car bearing the initials "B & A" and the number "39575" was received by the said Erie Railroad at Buffalo aforesaid and that said car did contain 21239 feet of grain door boards whereas in truth and in fact said car did contain only 9816 feet of grain door boards.

Conclusion.

And so the grand jurors aforesaid, upon their oath as aforesaid, do say that the said Asa K. Silverthorne, said Frederick W. Silverthorne, said Anthony W. Brick, said Walter H. Tobey, said Joseph W. Cannon and said Silverthorne Lumber Company Inc., at the time and place and in the manner and form aforesaid, did conspire to defraud the United States in a certain manner and each of said parties did do acts to effect the object of the said conspiracy; against the peace and dignity of the United States of America and contrary to the form of the Statute of the United States in such case made and provided. (Section 37, United States Criminal Code.).

STEPHEN T. LOCKWOOD,
Attorney of the United States in and for the Western District of New York.

26 United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshal for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

The petitioner, having filed its petition, duly verified, on the 27th day of February, 1919, and the affidavits of Frederick W. Silverthorne, Asa K. Silverthorne, and Walter H. Tobey, each sworn to on the 27th day of February, 1919, wherein it appears that Stephen T. Lockwood, United States District Attorney for the Western District of New York, and John D. Lynn, United States Marshal for the Western District of New York, and Julius H. Schwert, Foreman of the Grand Jury for the United States District Court, Western District of New York, now in session at the Federal Building in the City of Buffalo, New York, and Sidney W. Petrie, Clerk of the United States District Court for the Western District of New York, and all officers and officials of the United States of America, have in their possession certain books of account, bank books, check books, signed checks, promissory notes, liberty bonds, receipts of payments for liberty bonds, United States certificates of indebtedness, and divers other papers and memoranda belonging to the petitioner, and pertaining to its business and also divers

27 papers and memoranda belonging to its employees and officers, all of which were unlawfully seized, by virtue of an unlawful and unreasonable search and seizure made by and under the direction of officers of the United States Government, and after hearing Henry W. Killeen, Solicitor for the Petitioner, it is

Ordered, that Stephen T. Lockwood, United States District Attorney for the Western District of New York, John D. Lynn, United States Marshal for the Western District of New York, Julius H. Schwert, Foreman of said United States Grand Jury, and Sidney W. Petrie, Clerk of the United States District Court for the Western District of New York, show cause at the term of this court appointed to be held at the Federal Building in the City of Buffalo, Erie County, New York, on the 1st day of March, 1919, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why all the petitioner's said books of account, bank books, checks, notes, liberty bonds, U. S. certificates of indebtedness, and papers of every name and nature, and the papers of its employees, and of its officers, and managers, so unlawfully seized in said unlawful search by officers of the United States, should not be forthwith returned to the petitioner, and why the petitioner should not have such other and

further relief as to the Court seems proper in the premises. Service of this order by delivering copies thereof respectively to the respondents on or before 12 o'clock noon of this 28th day of February, 1919, shall be sufficient.

Dated, February 28, 1919.

JOHN R. HAZEL,
United States District Judge.

28 United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshal for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

The petition of Silverthorne Lumber Company, Inc., respectfully shows to this Honorable Court:

1. That your petitioner is a corporation created, organized and existing under and by virtue of the laws of the State of New York, with its principal office at North Tonawanda, in the County of Niagara and State of New York, and that your petitioner is a resident of the Western District of the State of New York.

2. That your petitioner is incorporated for the business of dealing in lumber, and has been engaged in such business for several years last past.

3. That on February 25, 1919, the President of your petitioner, one Frederick W. Silverthorne, was arrested at his home in the City of Buffalo, New York, early in the morning of said day, and later in the morning was arraigned before United States Commissioner Keating at the office of said commissioner in the City of Buffalo, on a charge of violation of Section 37 of the Penal Laws of the

29 United States; that the matters claimed to constitute a crime consisted in the sales of lumber to the Lehigh Valley Railroad Company, and the alleged fraudulent over-billing therefor; that at about the same time, one Asa K. Silverthorne, an employe of your petitioner, was likewise arrested on the same charge, and was also arraigned before the Commissioner at the same time as the arraignment of Frederick W. Silverthorne.

4. That while said arraignments were in progress in the City of Buffalo, a number of persons being, or pretending to be, officials or employees of the Railroad Administration, and being seven or eight in number in all, descended upon the office of your petitioner in North Tonawanda, entered said office, took all the books of account, bank books, check books, and other documents and records of your petitioner, and removed the same from the office of your petitioner to an automobile, or automobiles, then and there waiting, and carried

the same to the office of the United States District Attorney in the City of Buffalo; that your petitioner is unable to state in full what books, papers, documents and property were taken, for the reason that said detectives, or persons claiming to be such, gave no list or statement thereof to anyone in the office of your petitioner, and no list or statement thereof has since been furnished to your petitioner, but the things taken include the books of account, such as ledgers, day books, journals, cash books, check books, and bank books, cancelled checks, check stubs, tally books, letters, insurance policies, and other papers and memoranda; that the papers and memoranda carried off include not only those belonging to your petitioner, but papers, documents, memoranda and property belonging to officials and employees of your petitioner.

30 5. Your petitioner does not know whether or not any charge or claim is made against your petitioner of participation in the alleged offense.

6. The excuse or color for the action of the alleged detectives is this:

At the time of the entering upon the premises of your petitioner, said detectives served, or caused to be served, upon the employees there present, subpœnas to attend before the United States Grand Jury for said date, to-wit, February 25, 1919; that one of said subpœnas was apparently a subpœna duces tecum, calling for the production of books and papers; that as a matter of fact, no employee of your petitioner was required to produce, or allowed to produce, any books or papers, whether called for in the subpœna or otherwise, and the subpœna was merely colorable, and was not bona fide, and was for the purpose of affording some apparent excuse or justification for the unlawful and unreasonable search and seizure carried out under color of its authority.

7. Your petitioner further shows that there is missing from its safe, property of great value, to-wit, liberty loan bonds of the United States, of the par or face value of $30,300, and United States Treasury certificates of indebtedness, of the face or par value of $25,000.

8. Your petitioner further shows that it cannot conduct or carry on its business without the books, papers and documents seized. That among other things taken are negotiable promissory notes, payable to your petitioner, which will become due hereafter; checks to the order of your petitioner not yet cashed; checks drawn and signed by your petitioner to pay current bills; that without its books your petitioner does not know the bills that it owes, or the time of

31 payment thereof, or the debts or accounts due to it; that it is and will be unable to prepare the returns required by the United States Government for income tax purposes; that practically it must cease the doing of business until its books and papers are returned.

9. That in addition to other property seized and carried off, the detectives aforesaid carried off the receipts running to employees of your petitioner for payments on account of liberty loan bonds pledged to banks in Tonawanda or North Tonawanda, and that such receipts constitute the only evidence of ownership of said bonds.

10. Your petitioner does not know precisely where said books and papers are at the present time, but makes the United States District Attorney a party hereto for the reason that the books and papers were brought to his office, and makes the Marshal a party hereto for the reason that the Marshal, or some deputy, was among the persons who conducted the unlawful search and seizure aforesaid, and served, or is presumed to have served, the colorable subpœnas; makes the foreman of the Grand Jury a party hereto because the subpœnas required the appearance of the witnesses and the production of the books and papers before the Grand Jury, and makes the Clerk of the Court a party, for the reason that the papers, or some of them, may be in his custody by virtue of his office, and your petitioner is informed and believes that the unlawful and unreasonable search and seizure above recited, was made by, and under the control and direction of, the United States District Attorney for the Western District of New York.

11. That the foregoing allegations are made upon information and belief; that the sources of information and the grounds of belief of your petitioner, are the affidavits of Frederick W. Silverthorne and Walter H. Tobey hereto annexed, and the matters recited therein.

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12. No previous application has been made to any court or judge for a like rule to show cause herein.

Wherefore, your petitioner prays for a rule, directed to Stephen T. Lockwood, United States District Attorney for the Western District of New York, John D. Lynn, United States Marshal for the Western District of New York, Sidney W. Petrie, Clerk of the United States District Court for the Western District of New York, and Julius H. Schwert, Foreman of the Grand Jury for the Western District of New York, now in session at the Federal Building in the City of Buffalo, New York, to show cause forthwith before this court, why said books, papers, memoranda, documents, bonds, notes, checks, and any and all papers seized in said unlawful and unreasonable search, should not be returned to the petitioner.

And your petitioner will ever pray, etc.

SILVERTHORNE LUMBER COMPANY, INC.,
By FREDERICK W. SILVERTHORNE,
Its President.

PENNEY, KILLEEN & NYE,
Solicitors for Petitioner.

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WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, deposes and says that he is an officer, to wit, President, of the petitioner, Silverthorne Lumber Company, Inc., in the above entitled proceeding; that he has read the foregoing petition, and knows the contents thereof; and that the same is true of his own knowledge, except such matters as

are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 27th day of February, 1919.

M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

34 United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshal for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, deposes and says:

I reside at No. 321 Woodbridge Avenue in the City of Buffalo, Erie County, New York, and am a resident of the Western District of New York, and a citizen of the United States. I am the president of the Silverthorne Lumber Company, Inc., the petitioner herein, a corporation having its principal place of business at North Tonawanda, Niagara County, New York.

At 7:30 o'clock in the forenoon of the 25th day of February 1919, I was arrested at my residence by a deputy United States marshal, and was immediately thereafter taken to the United States Marshal's office in the Federal Building, in the City of Buffalo, N. Y. The warrant charged me with having violated section 37 of the Penal Law, and that, as it was alleged, I had sought to defraud the United States Government by overcharging invoices of lumber sold
35 to the Lehigh Valley Railroad Company.

At about eleven o'clock in the forenoon, I was taken before United States Commissioner Keating and my hearing was adjourned until the 4th day of March 1919, upon the motion of the Commissioner. I was admitted to bail in the sum of $7500.

After I was released, and on the same afternoon, I went to the office of the petitioner at North Tonawanda, New York, and learned that during the forenoon of that day, certain persons, representing themselves to be United States officials, had seized substantially all of the books and papers of the petitioner. I then made an examination and found that the ledgers, journals and other account books, check books, promissory notes, liberty bonds, receipts for Liberty

bonds; United States Government certificates, collapsible files, letter copy books, contracts, bank books, tally books, loading tickets, bills of lading, and freight receipts were missing from the office. The safe door of one of the safes was open, and everything was in utter confusion. In one of the safes, a private drawer had been pried open*ed* and the contents had been taken therefrom.

In our office, the petitioner carried $30,300 of liberty bonds. I searched for these and they were missing. The petitioner also had $25,000 of United States Certificates of Indebtedness. I searched for these and they were missing. During the various Liberty Loan drives, the employees of the petitioner had subscribed for liberty bonds. We bought these bonds for our employees and carried them at the bank, and upon each pay day, a certain amount was deducted from each subscriber's pay envelope, and he was given a receipt therefor, which was carried by the company. This is the only evidence the various employees had of the amount owing upon their respective bonds, and the only evidence the petitioner has
36 of the amount that each employee has paid upon the bonds subscribed by him. In addition to the books and papers of the petitioner which were missing, I found, upon search, that all my own personal private papers, memoranda were missing.

When I went to the office, there was not a single person in the office, or in the yards. All of our office force and yard force were taken to the Federal Building by United States officers. Our whole office and plant had been completely abandoned. There are three men regularly engaged in the office and about twelve or fifteen men around the yards. I immediately locked the safe, locked the office and took all the caution I could to protect petitioner's property, and then I started to make inquiries as to what caused the disappearance of our employees. I then learned that all of the office staff and employees had been taken to the Federal Building by United States officials.

At about the same time of my arrest, my father, Asa K. Silverthorne, the general manager of the petitioner, was also arrested, and he was brought to the United States Marshal's office and arraigned with me before Commissioner Keating, and he was admitted to bail in the sum of $15,000.

My father accompanied me to Tonawanda on the afternoon of February 25th and was a witness to all that I have hereinbefore described.

The petitioner has been charged with no offense. In order to transact the company's business, it is necessary to have its books of account and papers, and the officers of the petitioner are very much concerned about the disappearance of said $30,000 of liberty bonds, and said $25,000 of United States Certificates of Indebtedness, and the receipts of its employees for payments upon liberty bonds.
37 In addition thereto, there were divers and various checks made out by the company, payable to various persons, and the same had not been delivered. The check book with these checks is missing. Also, there are divers promissory notes, held by the company, which are missing.

On the morning of the 26th day of February 1919, I talked with Walter Tobey, who has charge of the books and papers of the company. I was informed by him that, on the morning of the 25th day of February 1919, divers persons, claiming to represent the United States Government, called at the office and served a subpœna upon him to appear before the United States Grand Jury and to produce the books of the petitioner; that without his acquies-ence or consent, the said persons, pretending to represent the United States Government, searched the petitioner's office and seized and carried away a large number of books, papers and memoranda belonging to the petitioner and to deponent and to said Asa K. Silverthorne, deponent's father, all of which more fully appears by the affidavit of said Tobey, hereto annexed.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 27th day of February 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

38 United States District Court, Western District of New York.

In the Matter of the petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshal for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Asa K. Silverthorne, being duly sworn, deposes and says:

I reside at No. 877 Delaware Avenue in the City of Buffalo, County of Erie and Western District of New York, and am the general manager of the petitioner.

I was arrested on the same morning as my son and was taken to the United States Marshal's office with him and was arraigned with him before United States Commissioner Keating, and after our release upon bail, I went with my son to North Tonawanda.

I have read the affidavit of my son, Frederick W. Silverthorne, hereto annexed, and know the contents thereof, and the facts set forth in said affidavit are true.

ASA K. SILVERTHORNE.

Sworn to before me this 27th day of February, 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

39 United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshall for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Walter H. Tobey, being duly sworn, deposes and says:

I am upwards of twenty-one years of age and reside at No. 169 Vandervoort street, North Tonawanda, Niagara County, New York, and am a citizen of the United States. I am also the vice-president and treasurer of the petitioner, Silverthorne Lumber Company, Inc. Ever since the organization of the Company in December 1914, I have had, and now have, immediate charge of the books, documents and records of the petitioner.

At about 10:15 o'clock in the forenoon of February 25, 1919, while I was engaged at work upon the books of the petitioner in the office of the petitioner at North Tonawanda, N. Y., an automobile containing seven persons drew up in front of the office and stopped. The occupants left the automobile and two of them walked down on the south side of the office, opposite where I was engaged, and two men, as I am informed, walked down on the north side of the office; then the others came into the office through the main door,
40 which is on the extreme north end of the office. I heard men talking to the clerks in the outer office. Then six or seven men came into my office. At about that time, another automobile drew up in front of the office and I think it had only one occupant beside the driver. One of the men, who came into the room, stated that he was a United States Marshal; another man stated that he was some official, and another claimed that he was a different official, but what their respective positions were, I do not recollect. Two of them showed me their badges.

The man, who represented himself to be the United States Marshal, then said that they wanted all the books and papers of the Company pertaining to railroads, Shingle Mills Selling Company and James W. McConkey. I asked them what the idea was, and they said they wanted them in court and that they must be taken there forthwith. The marshal then read to me a subpœna, addressed to me, directing me to produce the books and papers aforementioned. Then, without receiving any acquiescence or consent upon my part, the so-called marshal and the men with him proceeded through the office, taking

down books, files, papers and memoranda of all kinds. One so-called official stayed with me in the room where I was, and I was not permitted to go anywhere about the office unless this man accompanied me. There are five different rooms in the offices in which are kept books of account, papers, memoranda etc. The men, other than the one guarding me, then circulated through the various rooms and brought out files of books, papers, memoranda, etc., and carried them out and placed them in one of the automobiles. The men, who were carrying these books out of the office and placing them in the automobile, did not show me what books they were taking, and I had no opportunity and was not allowed to make any tabulation of the books, papers and effects, which were thus taken from the office and
41 placed in said automobile. I believe it would have taken a full hour to have tabulated a memorandum of the books and papers taken.

I was then told that I would have to forthwith go up to the United States Court at Buffalo, and that all of the bookkeepers, clerks in the office and men in the yards would also have to go to Buffalo.

Before we left for Buffalo, I stated to the men making the search that I would like to confer with the petitioner's attorney before I went to Buffalo, and one of their number replied that I did not need an attorney.

They then compelled me and the other office employees to get into the automobile and they drove us to the United States District Attorney's office in the Federal Building in the City of Buffalo. Before we left Tonawanda, all of the employees of the petitioner, in and about the yards, were directed to go to the United States Attorney's office in the Federal Building, in Buffalo, and they, so far as I am informed, went to Buffalo on trolley cars and appeared at the United States Attorney's office on the same day.

After we were in the United States Attorney's office for a short time, the men who seized the books at the petitioner's office brought the books upstairs in the Federal Building and carried them into the private office of the United States District Attorney. After that I did not see the books.

We arrived at the Federal Building a little before noon. The remainder of the day, the other employees of the petitioner and myself waited around the United States Attorney's office until about five o'clock. At about five o'clock in the afternoon, I was
42 directed to appear again in the United States Attorney's office the following morning at ten o'clock.

On the morning of the 26th, about ten o'clock in the forenoon, I appeared at the United States Attorney's office, in pursuance to said direction, and was shortly thereafter called before the Grand Jury. I was not directed to produce any of the books of the petitioner before the Grand Jury, and, in fact, I did not produce any of the books of the petitioner before the Grand Jury, and I was not examined in any wise respecting the books, papers and documents of the petitioner, which were taken from the office of the petitioner, as aforesaid. After a brief examination respecting the incorporation of the petitioner and its officers, stockholders and some of its methods of

doing business, I was excused and informed that I was discharged from further appearance.

When I was before the Grand Jury, I did not see any of the books and documents of the petitioner, and have not seen them since they were taken in the United States District Attorney's office.

The men who took the petitioner's books, papers and documents, as hereinbefore mentioned, took all that the petitioner had, and the petitioner has now no books, contracts, documents, bank books, check books, or records of any kind, and I am compelled to carry its business transactions upon a pad. It is absolutely necessary in the conduct of the petitioner's business that the books, memoranda and documents, taken from its files, should be returned forthwith. The petitioner's income tax has not been made out and it will be impossible to prepare it without the books and documents in ques-
43 tion.

WALTER H. TOBEY.

Sworn to before me this 27th day of February, 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

44 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Henry W. Killeen being duly sworn, says:

On February 27, 1919, in the afternoon, I went to the office of the United States Marshal in the Federal Building, Buffalo, N. Y. and there demanded of the officer in charge, to-wit, Deputy Marshal Cady, and also a Mr. Mix, who was called by Mr. Cady, on behalf of Silverthorne Lumber Company, Inc. all of the books, papers, documents, memoranda and property of said company, seized and taken from its office on February 25, 1919; Mr. Cady made no answer, and Mr. Mix referred me to Mr. Lockwood. I then demanded of Mr. Cady and Mr. Mix on behalf of Asa K. Silverthorne, the memoranda book taken from his person at the time of his arrest, and all of the papers, letters, correspondence, books, documents and memoranda belonging to him and taken on February 25, 1919, from the office of the Silverthorne Lumber Company. On this Mr. Mix also referred me to Mr. Lockwood.

I went to the office of Mr. Lockwood and made the same demands. Mr. Lockwood stated to me that he did not know what papers he did have; that he did not have some liberty bonds and certificates of indebtedness which I had mentioned; that as to what he did have, he refused the demands.

On February 28, 1919, in the morning, I made similar demands of Mr. Petrie, Clerk of the U. S. District Court, and Mr. Schwert, foreman of the Grand Jury, and was informed by each of them that they had none of the books or papers demanded.

HENRY W. KILLEEN.

Sworn to before me this 28th day of February, 1919.
M. W. WOOD,
Commissioner of Deeds in and for Buffalo, N. Y.

45 United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order *directing* — Stephen T. Lockwood, as United States District Attorney for the Western District of New York, etal. commanding the return *from* the petitioner — certain books, papers, and property, etc.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Stephen T. Lockwood, being duly sworn deposes and says:

That he is United States District Attorney for the Western District of New York; that the Grand Jury of the United States District Court for the Western District of New York, for the term commencing February 3rd, 1919, has been regularly and duly empaneled, sworn, organized and is regularly in session as such, and was so regularly in session on the 5th day of February, 1919.

That deponent as United States Attorney caused a Subpœna Duces Tecum to be issued by this Court directing the Silverthorne Lumber Company of Little Island, New York, and commanding said Silverthorne Lumber Company to produce certain papers purport-
46 ing to be all documents, books, records, memoranda, papers, etc., relating to cars into and out of the said Silverthorne Lumber Company, and also relating to the sale, billing, invoicing and charge of said cards and contents thereof, to and before the said Grand Jury assembled and in session at the United States Post Office Building, in the City of Buffalo, New York, forthwith; said subpœna being dated February 25th, 1919, in regard to the alleged violation of the statutes of the United States by one John Doe with copy of said subpœna duces tecum hereto annexed and made a part of this affidavit.

Upon information and belief that the United States Deputy Marshal duly served and executed said subpœna duces tecum on said Silverthorne Lumber Company on the 25th day of February, 1919.

Deponent is informed that one Anthony W. Brick is the Secretary of the said Silverthorne Lumber Company; that one Walter H. Tobey is Vice-President and Treasurer of said Silverthorne Lumber Company; that one John S. Monroe is Clerk in charge of the office at Little Island, New York; that said Anthony W. Brick, Walter H. Tobey, and John S. Monroe were present at the time that the Deputy United States Marshal served the subpœna on the said Silverthorne Lumber Company; that a large quantity and number of books, documents and papers were produced before the above-mentioned Grand Jury, for its investigation with reference to the alleged violation of the statutes of the United States by one John Doe as described

47 in said subpœna duces tecum; that hereto annexed and marked "B" is a list of the books, documents and papers actually used by said Grand Jury, offered in evidence and marked for identification for use and consideration by the said Grand Jury in its investigation of the alleged violation mentioned in said subpœna duces tecum. That deponent believes that all the property, books, papers and documents mentioned in said list marked "B" is material, relevant and a necessary part of the evidence to be considered by said Grand Jury with reference to the alleged violation of the statute of the United States by one John Doe as mentioned in said subpœna duces tecum.

That deponent has in his possession all of the other documents, and papers which deponent is informed were collected together with the papers, books and documents mentioned in said list marked "B," and that said other books, papers and documents not mentioned in said list marked "B" are described in the list hereto annexed marked "C." That deponent does not consider said books, papers and documents in said list marked "C" as relevant material or necessary to the investigation to be conducted by said Grand Jury as aforesaid, and thereby offers the return of same to said Silverthorne Lumber Company.

That said Grand Jury has not completed its deliberations upon the evidence produced with reference to the alleged violation mentioned heretofore in said subpœna duces tecum.

That all books, papers and documents mentioned in said
48 lists marked "B" and "C" are all the books, papers and documents in deponent's and in said Grand Jury's possession, and that the books, documents and papers mentioned in said lists marked "B" and "C" constitute all the books, property or papers of every kind and nature brought to or produced before deponent by the United States Deputy Marshal belonging to the Silverthorne Lumber Company at Little Island, New York. That deponent has not seen and does not know and has not in his possession and never has had any United States Liberty Bonds, nor United States Certificates of Indebtedness.

(Signed) STEPHEN T. LOCKWOOD.

Subscribed and sworn to before me this 1st day of March, 1919.

(Signed) FRANCIS E. KERWIN,

[SEAL.] *Notary Public, Erie County, N. Y.*

49 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., for an Order, etc.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Thomas E. Moran, being duly sworn says:

I am a Deputy Marshal of the United States for the Western District of New York, and on February 25th, 1919, was designated to

serve a subpœna duces tecum on the Silverthorne Lumber Company, commanding and directing said company to produce certain books, papers and documents, copy of which subpœna is hereto annexed and marked "A." That deponent served said subpœna duces tecum on Walter A. Tobey on the 25th day of February, 1919, about 10.15 o'clock A. M. That said Walter A. Tobey was pointed out to deponent as Vice-President and Treasurer of the Silverthorne Lumber Company; that at the time deponent so served said subpœna he was accompanied by Mr. Buchanan of the Department of Justice,
50 Mr. Snyder and Mr. McCarthy and Mr. Campbell. That deponent read said subpœna to said Tobey and explained to him that by said subpœna said Silverthorne Lumber Company was required to forthwith produce the papers and documents mentioned therein before a Grand Jury of the United States in session at the Post Office Building, Buffalo, New York. Tobey told deponent "I don't know just what papers and books they want." Deponent thereupon introduced Mr. Snyder as a representative of the American Railroad Administration, and told said Tobey that said Snyder would be able to assist him, as he probably would know just what papers and books the Court wanted. I then left Mr. Tobey with Mr. Snyder and proceeded to serve other subpœnaes on other witnesses both in the office and in the lumber yard adjacent thereto. When I returned to the office I found a large quantity of books, papers and documents placed upon various desks in different parts of the offices, said Tobey and the Secretary of said company one Brick and another employee John Monroe being present. I then saw all of the papers and books being taken from the various desks from the office into two automobiles standing outside. Mr. Tobey and Mr. Brick did not return in the automobile in which I rode to Buffalo. I am informed that Tobey and Brick accompanied the other automobiles to Buffalo. The next that I saw of Tobey was in the United States Attorney's office at Buffalo. I did not touch any of the books or papers subpœnaed, and saw nothing of any Liberty Bonds or Certificates of Indebtedness.

(Signed) THOMAS E. MORAN.

Subscribed and sworn to before me this 1st day of March, 1919.

(Signed) FRANCIS E. KERWIN,
Notary Public, Erie Co., N. Y.

51 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY for an Order, etc.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

William F. Waters, being duly sworn deposes and says that he was designated as a guard to accompany the United States Marshal in subpœnaing books, papers and documents of the Silverthorne

Lumber Co. and various employees of the Silverthorne Lumber Co. on the 25th day of February, 1919, to a Grand Jury in session in the Post Office Building in the City of Buffalo, N. Y.

That deponent arrived at the office of Silverthorne Lumber Co. at Little Island, N. Y. about 10:45 A. M. on the said 25th day of February 1919; that at the time deponent arrived at said place the Deputy Marshal had already served the subpœna duces tecum on the officers of the Silverthorne Lumber Co. and deponent found a large quantity of books, papers and documents upon various desks in different parts of said offices; that deponent observed each of said articles as they were taken by various persons from said offices to an automobile standing in front of said offices; that a Mr. Tobey,
52 Vice-President of the Silverthorne Lumber Co. and a Mr. Brick, Secretary of the Company were present when each of said articles were being so taken from said offices; that deponent asked said Tobey if he had a box in which to place the small papers and books and said Tobey showed deponent where he could find such a box; that said Tobey and said Brick made no objection whatever to the United States Deputy Marshal when said articles were taken from the offices to the automobiles; that deponent saw no Liberty Bonds or certificates of indebtedness and deponent observed each article as it was taken from the safe in said offices; that no locks or drawers whatever were broken into or pried open in said offices while the said United States Marshal was therein on said 25th day of February 1919; that said Tobey and said Brick accompanied the automobiles *to* which all of said books and papers were placed during its entire trip from the offices of the Silverthorne Lumber Co. to the Post Office of Buffalo, N. Y.

(Signed) WILLIAM F. WATERS.

Subscribed and sworn to before me this 1st day of March, 1919.

(Signed) FRANCIS E. KERWIN,

[SEAL.] *Notary Public, Erie County, State of New York.*

53 STATE OF NEW YORK,
City of Buffalo, County of Erie:

Anthony W. Brick, being duly sworn, deposes and says: that I reside in the City of North Tonawanda, N. Y., and I am Secretary of the Silverthorne Lumber Company, Inc., having charge of the commercial selling of said corporation.

I was present at the office of the Silverthorne Lumber Company about 10:00 A. M. on the 25th day of February, 1919, at which time I was served with a subpœna. I know that certain records, tally books, letters and memoranda concerning the business of the Silverthorne Lumber Company were taken at that time under subpœna duces tecum and I made no objection to the removal of said books and papers. We proceeded immediately to Buffalo to the Office of the United States Attorney, Mr. Lockwood. I did not make any protest to him.

(Signed) ANTHONY W. BRICK.

Sworn to before me this 28th day of February, 1919.
(Signed) JOHN T. WALSH,
Notary Public, Erie County, State of New York.

54 STATE OF NEW YORK,
City of Buffalo, County of Erie:

John S. Munro, being duly sworn deposes and says: I live at 156 Spruce Street, in the City of North Tonawanda, N. Y.; I have been employed by the Silverthorne Lumber Company, Inc., since September 1917 as stenographer and invoice clerk; deponent was present in the office of the Silverthorne Lumber Company, Inc., on the 25th day of February, 1919, about 10:15 A. M. when Marshal Moran served a subpœna on deponent to appear forthwith before the United States District Court; subpœnas were also served upon all the employes and officers of the Silverthorne Lumber Company present at that time; deponent assisted Vice-President and Treasurer Tobey and Secretary Brick of the Silverthorne Lumber Company in collecting reports, records and memoranda concerning the business of the Silverthorne Lumber Company; that said officers accompanied deponent with the aforesaid records to the United States District Attorney's office in Buffalo, New York. No locks were forced in desks or safes to deponent's knowledge.

Before leaving the office of the Silverthorne Lumber Company, Vice-President Tobey requested permission of the aforesaid Marshal to consult an attorney which permission was granted but was not acted upon by said Tobey.

(Signed) JOHN S. MUNRO.

Sworn to before me this 28th day of February, 1919.
(Signed) JOHN T. WALSH,
Notary Public, Erie County.

55 The President of the United States to Silverthorne Lumber Co., Little Island, N. Y., Greeting:

We command you, that all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo on the — forthwith to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be all documents, books, records, memorandum, papers, etc., relating to movements of cars into and out of your yards; also relating to sale, billing, invoicing and charge of said cars and contents thereof, now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, judge of the United States District Court, at the City of Buffalo, on the 25th day of February, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the Western District of New York.

"A."

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"B."

Exhibit number.	Description.
78	1 Tatum Holder, Style 411, containing 38 memorandums, freight-bills or duplicate invoices, and letters.
30	Book of Certificates of Capital Stock in blank of Silverthorne Lumber Co., Inc., 31 to 100 inc.
33	Invoice Book, bearing copies of Invoices from Silverthorne Lumber Co. to purchasers, numbered 9.
32	Invoice Book, bearing copies of invoices from Silverthorne Lumber Co. to purchasers, number 8.
31	Stock Book of Corporation.
34	Invoice Book, bearing copies of invoices from Silverthorne Lumber Co. to purchasers, number 7.
40	Check book of Silverthorne Lumber Co. bearing stubs and blank checks.
36	Ledger Silverthorne & Co.
38	Journal No. 2 Silverthorne Lumber Co. Inc.
37	Journal No. 3 Silverthorne Lumber Co., Inc.
35	Transfer Ledger Silverthorne Lumber Co., Inc.
48	Shannon Transfer Case No. 1, marked to contain receipts from Jan. 1 to May 31, 1918.
47	Shannon Transfer Case No. 2, marked to contain receipts from June 1, 1918, to Sept. 30, 1918.
49	Shannon Transfer Case No. 3, marked as containing receipts from Oct. 1, 1918, to Dec. 31, 1918.
53	Envelope containing 8 carbon copies of tenders by Erie R. R. Co.

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Sheet No. 2.

Exhibit number.	Description.
46	Cabinet Binder containing receipts for amounts paid by Silverthorne Lumber Co. since Jan. 1, 1919.
41	1 Bundle marked "Checks 1918," wrapped in blue paper and tied with cord.
43	1 Clip Board with bills-of-lading or copies thereof, or switching receipts commencing date about Jan. 3, 1919, to closing date, Feb. 24, 1919.
55	12 Unlabeled Documents appearing to be statements of profit and loss, made separately for each calendar month, 1918.
42	File of bills-of-lading, duplicates thereof and switching receipts, labeled "Bills of Lading, July 1, 1918, to Dec. 31, 1918."
52	1 File Folder, marked "A. K. Silverthorne," containing 27 pay statements, credit memos., letters, telegrams, post-cards, or carbon copies of letters or telegrams.
51	1 File Folder, marked "F. W. Silverthorne," containing 72 pay statements, memorandums, letters, telegrams or copies of letters or telegrams.
77, 76, 75, 8, 74, 7, 19, 72, 9, 73, 71, 70, 69, 68, 67, 66, 64, 63, 56, 28, 61, 62, 57, 20, 59, 16, 60, 83, 17, 5, 21, 6, 18, 4, 26, 29, 27,	37 Tally Books, containing record of quantities of lumber loaded into cars.
65	Memorandum book, labeled "Car Book Robinson Bros. Tram."
44	Card-board shipping record, identified by the number 181, and Customer's Order No. 1751.

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Sheet No. 3.

1. Lumber Tally Book, containing record of quantities of Lumber leaded int ocars and labeled "10."
1. Bundle of Canceled Checks (127) faced with statement of Frederick Robertson & Co., Bankers, and marked in red "January, 1919."
29. Card-board shipping records, bearing on one side the word "Ship" followed by point to which lumber to be sent and to whom to be consigned, and on the reverse side headed "Shipments," record of shipments made to apply on order covered by shipping record.

59 "C."

Buffalo, N. Y., —— —, 191–.

Received from United States Marshal all of the documents, books, papers, etc., enumerated below, each of which bears a number corresponding to the one opposite which it is listed hereon, the list containing numbers 1 to 84, inclusive.

1. Insurance policy No. F-293, of the Connecticut General Life Insurance Company.
2. Automobile liability policy No. 3,797,500, of the Fidelity and Casualty Co. of New York.
3. Life Insurance Policy No. 230,853 of the Northwestern Mutual Life Insurance Co.
4. Automobile Policy No. 9,839 of the Palatine Insurance Co. Ltd.
5. Automobile Policy No. 7684 of the Union Marine Insurance Co. Ltd.
6. Automobile Casualty Policy No. FA-1,701,923 and AX-1,701,-923 of the Travellers Insurance Co. and the Travellers Indemnity Co. respectively.
7. The Royal Death and Dismemberment policy No. DD-25 of the Royal Indemnity Co.
8. Life Insurance Policy No. 214,956 of the Ætna Life Insurance Co.
9. Life Insurance Policy No. 64,545 of the National Life Insurance Co., Montpelier, Vermont.

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10. Life Insurance Policy No. 611,249 of the Penn Mutual Life Insurance Co.
11. Life Insurance Policy No. 1,013,237 of the Equitable Life Assurance Co. of the United States.
12. Life Insurance Policy No. 1,013,234 of the Equitable Life Insurance Society of the United States.
13. Fire Insurance Policy No. 176,693 of the Buffalo Insurance Co.
14. Automobile Liability Policy No. A25,372 of the Hartford Accident and Indemnity Co.
15. Fire Insurance Policy No. 33,282 of the Continental Insurance Co.
16. Fire Insurance Policy No. 33,710 of the Continental Insurance Co.
17. Fire Insurance Policy No. 6,116 of the Springfield Insurance Co.
18. Fire Insurance Policy No. 113,405 of the Ætna Insurance Co.
19. Fire Insurance Policy No. 166,569 of the Buffalo German Insurance Co.
20. Residence Theft Policy No. 556,859 of the Fidelity and Casualty Co. of New York.
21. Fire Insurance Policy No. 110,290 of the Commerce Insurance Co. of Albany, N. Y.
22. Automobile Casualty Policy No. FA-1628849 and AX-1628849 of the Travellers Insurance Co. and the Travellers Indemity Co. respectively.

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23. Automobile Policy No. A-107,491 of the Royal Insurance Co. Limited.
24. Automobile Policy No. A-124,618 of the Royal Insurance Co. Limited.
25. Automobile Casualty Policy No. FA-1,702,149 and AX, 1,702,-149 of the Traveler's Insurance Company and the Traveler's Indemnity Co. respectively.
26. Fire Insurance Policy No. 34,603 of the Continental Iusurance Co.
27. Fire Insurance Policy No. 5,182 of the Sterling Fire Insurance Co. Indianapolis.
28. Fire Insurance Policy No. 11,040,354 of the Commercial Union Assurance Co. Ltd. of London, England, marked duplicate.
29. Fire Insurance Policy No. 11,040,353 of the Commercial Union Assurance Co. Ltd. of London, England, marked duplicate.
30. Fire Insurance Policy No. 11,040,354 of the Commercial Union Assurance Co. Ltd. of London, England.
31. Fire Insurance Policy No. 11,040,353 of the Commercial Union Assurance Co. Ltd. of London, England.
32. Fire Insurance Policy No. 215 of the Norwich Union Fire Insurance Society, Ltd.
33. Fire Insurance Policy No. 5213 of the Sterling Fire Insurance Co. Indianapolis.
34. Fire Insurance Policy No. 48,296 of the Firemen's Insurance Co. of Newark, N. J.

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35. Fire Insurance Policy No. 612,317 of the Rhode Island Insurance Co. of Providence, R. I.
36. Fire Insurance Policy No. 48,313 of the Firemen's Insurance Co. of Newark, N. J.
37. Workmen's Compensation and Employer's Liability Policy No. 4,248,565 of the Fidelity & Casualty Co. of New York.
38. Lake Cargo Policy No. 1,558 of the Firemen's Fund Insurance Co. of San Francisco, California.
39. Package of eighteen receipts of National Life Insurance Co. for payments on contract No. 64,545.
40. Package of twenty-seven receipts for payments made on Policy No. 230,853 of the Northwestern Mutual Life Insurance Co.
41. Package of three receipts for premiums paid on Policy No. 611,249 of the Penn Mutual Life Insurance Co.
42. Receipt of the National Life Insurance Co. for last premium due under contract No. 64,545, with two letters attached.
43. Package of eighteen receipts of the Equitable Life Assurance Co. of the United States for premiums paid on Policy No. 1,013,237 and No. 1,013,234 with letter attached.
44. Package of twenty-five receipts for payments made on contract No. 214,956 of the Ætna Life Insurance Co.

45. Package of sixteen receipts of the Equitable Life Assurance Co. of the United States for premiums paid on policy No. 1,013,237 and 1,013,234, with a receipt of Humphrey and Vandevoort, agents, of Jan. 7th, 1901 attached.

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46. Letter from the Equitable Life Assurance Co. of the United States dated Feb. 22nd, 1916 with statement of account attached.
47. Letter of Equitable Life Assurance Co. of the United States dated Feb. 14th, 1916.
48. Letter of Asa K. Silverthorne to E. D. Swift, cashier, Equitable Life Assurance Co. dated Feb. 15th, 1916.
49. Papers in duplicate of United States District Court, Western District of New York entitled "In the Matter of Asa K. Silverthorne, and also doing business under the assumed name of Silverthorne & Co. bankrupt—in Bankruptcy No. 5806."
50. United States Fidelity & Guaranty Co. surety bond in favor N. Y. C. R. R. Co. executed Aug. 7th, 1918.
51. United States Fidelity & Guaranty Co. bond favor Erie Railroad Company at Buffalo, N. Y., executed Aug. 24th, 1918.
52. Bond of United States Fidelity & Guaranty Co. favor Erie Railroad Company executed Aug. 14th, 1918.
53. Note of James W. McConkey dated January 17, 1919 favor Silverthorne Lumber Co. in amount $503.00.
54. Note of Carl Steinbrenner dated Feb. 23, 1918 for $181.00.
55. Note of Stanislaus Moneyjnski dated Febr. 24, 1919 for $800.
56. Note of Stanislaus Moneyjnski dated Feb. 24, 1919, for $1783.11.
57. Note of Frank J. Shields dated Oct. 28, 1918, for $1000.00.

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58. Note of Anchor Silo Manufacturing Co. of Feb. 25, 1918, for $5123.13.
59. Note of Anchor Silo Mfg. Co. dated Jan. 28, 1918 for $853.32.
60. Note of James E. Tague Co. dated Feb. 5, 1919 for $696.23.
61. Note of Leinbach Box Co. dated Feb. 17, 1919 for $400.00.
62. Last will and testament of Mattie F. Silverthorne marked copy.
63. Copy of certified voucher of the New York Central & Hudson River Railroad Co. to Silverthorne & Co. in amount of $1416.06.
64. Blank copy of form of release executed account Lehigh Valley Railroad Co.
65. Blank copy of form of release executed account Lehigh Valley Railroad Co. with letter or note dated March 7, 1913 signed "Payne" attached.
66. Correspondence of three letters, viz. Stanchfield & Levy to Payne & Lindsay dated March 1, 1912; Payne & Lindsay to Staunchfield & Levy dated March 4, 1913; Staunchfield & Levy to Payne & Lindsay dated March 5, 1913.

67. Envelope containing card of A. J. Morris, Toronto, Canada with memos. on back; letter of Thomas E. Coal Lumber Co. to Richards & Co. dated July 31, 1918; typewritten copy of C. B. Williams, purchasing agent note of July 24, 1918 reference supplies together with what appears to be a reply of Silverthorne Lumber Co.; memoranda on red paper headed Philadelphia & Reading referring to quantities and dimensions of lumber.

65

68. Envelope containing letter of Dierks Lumber & Coal Co. dated March 23, 1918 quoting prices; letter of Dierks Lumber & Coal Co. dated March 19, 1918 quoting lumber prices; copy telegram of Asa K. Silverthorne to Mosier & Shields, St. Louis; pencil copy of letter to Mosier & Shields, St. Louis without date; blue paper memoranda reference lumber; letter Charles L. Baxter to Silverthorne Lumber Co. March 20, 1918.

69. Envelope containing File of correspondence between Silverthorne Lumber Co. and P. M. Shaw Jr. & Co. reference lumber.

69–Cont. Letter of Central Warehouse Lumber Co. to Silverthorne Lumber Co. July 31, 1918 giving lumber quotations; letter Central Warehouse Lumber Co. July 31, 1918 addressed to Commission Men; quotations of lumber prices issued by W. T. Ferguson Lumber Co. dated July 18, 1918; letter of Crookstone Lumber Co. to Silverthorne Lumber Co. dated July 31, 1918 quoting prices of lumber; white sheet bearing memorandum appearing to refer to lumber.

70. Envelope containing Workmen's Time Book marked "Mrs. M. F. Silverthorne"; also file of letters, invoices, etc. all of which appear to relate to the construction of the residence and garage at 321 Woodbridge Avenue, Buffalo.

66

71. Folder containing small sheet of memoranda first reading "Binghampton Hardwood Flooring Co."; envelope containing note of John Costello dated July 12, 1918 together with receipts and memoranda relating thereto; yellow paper carrying memoranda reference lumber; Meeds Lumber Co. acknowledgment of order No. 512 dated Feb. 22, 1919; piece pencil paper carrying memoranda noted Silverthorne Co.; request of Vacuum Oil Co. for quotations dated Oct. 4, 1918; request of Vacuum Oil Co. for quotations dated Aug. 20, 1918; yellow paper memoranda presumably reference lumber; copy of Central Railroad Co. of New Jersey voucher No. 37520, May 23, 1911 for $705.26; copy of Michigan Central Railroad Co. voucher audit No. 17864 dated May 22, 1911, $28.00; certified copy of New York Central & Hudson River Railroad Co. voucher audit No. 24379, June 2, 1911 for $6597.82; copy message A. K. S. to F. J. Shields & Co.;

eighteen letters from various individuals acknowledging receipt of holiday presents.

72. One paper portfolio containing documents designated by letters of the alphabet consecutively from A to V inclusive noted on each document with lead pencil.
73. Small vest pocket notebook (black leather) "Compliments of Silverthorne & Co. North Tonawanda, N. Y." containing memoranda.
74. Black leather index, loose-leafed notebook about 4 1-2" x 8" in size containing few memoranda.
75. Check book Frederick Robertson & Co. Bankers; number of first stub being 30.
76. Check book Frederick Robertson & Co. Bankers, stub of first check therein being No. 1.

67

77. Bank book Frederick Robertson & Co. Bankers, in account with Walter H. Tobey, showing last deposit Jan. 22nd, 1919.
78. Bank book Frederick Robertson & Co. Bankers in account with Silverthorne Lumber Co. showing last deposit on Feb. 5, 1919.
79. Small memorandum reference $60.00 check for collection.
80. Thirty-two sheets bearing memoranda altogether under rubber band.
81. Small pink memorandum.
82. First National Trust Co. notice of protest to Walter H. Tobey dated Sept. 10, 1918.
83. Collection of fifty-two cancelled checks signed Walter H. Tobey.
84. Eight sheets listing checks drawn appearing to have been torn from a check book.

68 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., for an Order Directing Stephen T. Lockwood, etc., et al.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Anthony W. Brick, being duly sworn, says:

With reference to my affidavit, made February 28, 1919, and presented to the Court by the United States District attorney, I desire to say:

Assistant District Attorney Mills insisted that I sign the affidavit in the form in which it was drawn. Before I signed it, I wanted him to put into the affidavit a statement to the effect that, at my suggestion, Mr. Tobey was about to telephone to attorney Lewis T. Payne of North Tonawanda, and that one of the men, who took the books and papers, said, "No, never mind an attorney, you can get an attorney when you get to Buffalo." I also wanted to put in the affi-

davit, after the words "I made no objection to the removal of said books and papers" something to the effect that I was not asked for any consent, and that I did not know that I had any right to such. He told me that those statements were not necessary in the affidavit, and that he did not want them, and requested me to sign the
69 affidavit as drawn. I felt that I had to sign the affidavit, as drawn, and I did so. As far as it goes, it tells the truth, but it does not tell all of the truth.

As a matter of fact, on February 25, 1919, at the time of the seizure of the books and papers in the office of the Silverthorne Lumber Company, Inc., I was not asked anything about consenting to the taking of any, and was not asked to produce any, and while I was present and could see what was going on, all of the books, papers and documents gathered up, were gathered up by the men who had come in the two automobiles, and I did not see Mr. Tobey or Mr. Monroe, or any officer or any employee of the Silverthorne Lumber Company, Inc., get a single book, paper or document.

I understood at the time that I was under restraint and subject to the orders of the men who had entered the premises, and that I was obliged to do as they said and to accompany them wherever they demanded. One of the men told me that I had to go with him, and for a time I was compelled to stay in one room.

ANTHONY W. BRICK.

Sworn to before me this 3rd day of March 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

70 At a Term of the United States District Court Held at the Federal Building, in the City of Buffalo, Erie County, Western District of New York on the 6th Day of March, 1919.

Present: Hon. John R. Hazel, United States District Judge, Presiding.

United States District Court, Western District of New York.

In the Matter of the Petition of SILVERTHORNE LUMBER COMPANY, INC., for an order directed to Stephen T. Lockwood, as United States District Attorney for the Western District of New York; John D. Lynn, as United States Marshal for the Western District of New York; Julius H. Schwert, as Foreman of the Grand Jury of the United States District Court for the Western District of New York, and Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, commanding the return to the petitioner of books, papers, documents, and property unlawfully seized and taken.

A rule directed to the above named respondents having heretofore and on the 28th day of February, 1919, been granted by the Hon.

John R. Hazel, United States District Judge for the Western District of New York, to show cause at a Term of this Court, appointed to be held at the Federal Building, in the City of Buffalo, Western District of New York, on the 1st day of March, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard, why the respondents and all officers and officials of the United States of

71 American, having in their possession the books of account, bank books, check books, signed checks, promissory notes, missing Liberty Bonds, receipts of payments for Liberty Bonds, United States certificates of indebtedness, and divers other papers and memoranda belonging to the petitioner, Silverthorne Lumber Company, Inc., and pertaining to its business, and also divers papers and memoranda belonging to its employees and officers, as a result of an unreasonable search and seizure made by and under the direction of said respondents and officials, should not return said books, papers and memoranda forthwith to the petitioner; and on the said 1st day of March, 1919, the petitioner having appeared before this Court by Henry W. Killeen and James O. Moore, its counsel, and the respondents having appeared by United States District Attorney, Stephen T. Lockwood, and Assistant United States District Attorney, Carl Sherman; and upon reading and filing the said rule to show cause, and the petition of the petitioner, Silverthorne Lumber Company, Inc., verified on the 27th day of February, 1919, and the affidavits of Frederick W. Silverthorne and Asa K. Silverthorne, both sworn to on the 27th day of February, 1919, and the affidavits of Walter H. Tobey and Henry W. Killeen, both sworn to on the 28th day of February, 1919, and the affidavits filed by the respondents, the affidavit of Stephen T. Lockwood, Thomas E. Moran, William F. Watters, Anthony W. Brick, and John S. Monroe, all sworn to on the 1st day of March, 1919; a copy of the subpœna issued out of this Court on the 25th day of February, 1919, directed to the

72 Silverthorne Lumber Company, Inc.; a schedule of books attached to said affidavits; the affidavit of Julius H. Schwert, sworn to on the 3rd day of March, 1919, and the replying affidavit of Anthony W. Brick, sworn to on the 3rd day of March, 1919, whereby it satisfactorily appears to the Court that the books, papers, memoranda, property and effects were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpœna duces tecum, in violation of the constitutional rights and privileges of the petitioner; and after hearing Henry W. Killeen and James O. Moore, of counsel for the petitioner, and the Assistant United States District Attorney, Carl Sherman, and after due deliberation

Now, on motion of Penney, Killeen & Nye, it is

Ordered, that the United States District Attorney, Stephen T. Lockwood, and the United States Marshal, John D. Lynn, and all officers and officials of the United States, having in their possession any of the aforesaid books, accounts, papers and memoranda, forthwith deliver and return the same to the petitioner, Silverthorne Lumber Company, Inc., and any and all other books, papers and memoranda belonging to the petitioner or pertaining to its business, and

any and all papers and memoranda belonging to its employees and officers; and it is

Further ordered, that the said Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, forthwith deliver to the clerk of this Court all copies, excerpts, notations of and from any of said books, papers, documents and mem-
73 oranda, and any and all photographs, negatives and photostats thereof, made by or for said United States District Attorney or United States Marshal, or in their possession, or made by or for any of their respective representatives, agents or servants, and said United States District Court Clerk shall thereupon enclose all of said copies, excerpts and notations of and all said books, papers and documents, and any and all photographs, negatives and photostats thereof, in a secure wrapper and seal the same, and shall not expose, or permit to be exposed, the same to the inspection of any person whatsoever, until the further order of the Court in the premises.

This order shall be sufficiently complied with by delivery, as aforesaid provided, on or before 11 o'clock in the forenoon on March 6, 1919.

(Signed) JOHN R. HAZEL, *D. J.*

74 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

Petitioner having filed his petition duly verified the 3rd day of March 1919, wherein it appears that this Court has directed that an order be made and entered directing the return to one Silverthorne Lumber Company, certain books, papers and documents now in the possession and custody of your petitioner, wherein it appears that said books, papers and documents of said Silverthorne Lumber Co. so directed to be restored are material and necessary evidence in certain proceedings of the Grand Jury of this Court against John Doe and are material and necessary evidence in support of probable indictments by the said Grand Jury; it appearing that your petitioner fears that the said books and papers if so surrendered or if restored will be lost, mislaid, destroyed and removed beyond the jurisdiction and rendered invaluable as evidence, on motion of Stephen T. Lockwood, United States Attorney and attorney for said petitioner, it is hereby

75 Ordered that the Silverthorne Lumber Company and its attorney show cause at a term of this Court to be held in the Federal Building, City of Buffalo, on the 5th day of March, 1919, at two o'clock P. M. or as soon thereafter as counsel can be heard, why the books, papers and documents of the Silverthorne Lumber Company directed to be returned to said Silverthorne Lumber Com-

pany by this Court, should not forthwith be impounded in the custody of the law for use upon the Grand Jury proceedings against John Doe and for use upon the trial of any indictment found by said Grand Jury by virtue of said proceedings; and it is hereby further

Ordered that a service of the copy of this order upon Henry W. Killeen, Esq., and James O. Moore, Esq., on or before the 4th day of March, 1919, should be deemed sufficient.

Dated Buffalo, N. Y., March 4th, 1919.

(Signed) JOHN R. HAZEL,
United States Judge.

76 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

Your petitioner, Stephen T. Lockwood, Esq., Attorney of the United States in and for the Western District of New York, respectfully shows:

First. That he resides in the City of Buffalo, Erie County, N. Y., and is United States Attorney for the Western District of New York.

Second. That this Court has directed that an order be made returning to one Silverthorne Lumber Company certain papers and documents, which order is made on a petition of the Silverthorne Lumber Company verified the 27th day of February, 1919.

Third. That your petitioner refers to said petition and to the affidavits filed in opposition thereto as follows, to wit: affidavit of Stephen T. Lockwood, verified the first day of March, 1919; affidavit of Thomas E. Moran, verified the first day of March, 1919; affidavit of William F. Waters verified the first day of March, 1919, and affidavit of Anthony W. Brick verified the 28th day of
77 February 1919; affidavit of John S. Munro verified the 28th day of February 1919; affidavit of Julius Schwerz verified the first day of March 1919, together with duces tecum marked "A" and the lists marked "B" and "C" attached to said affidavits and made a part thereto and your petitioner hereby refers to said papers and affidavits and makes them a part of this petition.

Fourth. Your petitioner further states that he fears that the books, papers and documents mentioned and described in said list marked "B" if surrendered to the Silverthorne Lumber Company will be lost, mislaid, destroyed or removed beyond the jurisdiction and rendered invaluable as evidence.

Fifth. That all the books, papers and documents in list marked "B" are the property of a corporation, to wit, the aforementioned Silverthorne Lumber Company.

Wherefore, your petitioner prays for a rule directed to said Silver-

thorne Lumber Company and its attorneys, to wit, Henry W. Killeen, Esq., and James O. Moore, Esq., to show cause forthwith before this Court why the said books, papers and documents should not be impounded in the custody of the Clerk for use upon the Grand Jury proceedings now pending against John Doe in reference thereto and for use upon the trial — any indictment that may be found upon any Grand Jury proceedings, and that said books, papers and documents may be placed in the custody of the Court and held for the aforementioned purposes.

Dated, Buffalo, N. Y., March 3rd, 1919.

(Signed) STEPHEN T. LOCKWOOD,
United States Attorney, Western District of N. Y.

78 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Stephen T. Lockwood, being duly sworn, deposes and says that he is Attorney of the United States in and for the Western District of New York; that he has read the foregoing petition, and knows the contents thereof; and that the same is true of his own knowledge, except such matters as are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) STEPHEN T. LOCKWOOD.

Sworn to before me this 3rd day of March, 1919.

(Sgd.) FRANCIS E. KERWIN,
Notary Public, Erie County, New York.

79 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

Now comes the respondent, Silverthorne Lumber Company, Inc., and makes this its answer to the petition of Stephen T. Lockwood, United States District Attorney, as follows:

First. It denies that there are any grounds for fear that its books, papers and documents seized and unlawfully held by the United States District Attorney for the Western District of New York will be lost, mislaid, destroyed or removed beyond the jurisdiction of this Court, or otherwise rendered invaluable as evidence of any fact of which they may be otherwise competent.

Second. It denies that all the books, papers and documents mentioned in the list marked "B" attached to the affidavits mentioned in the petition, are the property of the Silverthorne Lumber Company, Inc., and alleges the fact to be that many of said docu-

80 ments, papers and records belong to one Asa K. Silverthorne, this company's General Manager.

Third. This respondent further shows that on the 25th day of February, 1919, without warrant in law, the said Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, for the Western District of New York, their servants, agents and representatives, did by force wrongfully and unlawfully enter upon the premises of this respondent at North Tonawanda, New York, and conduct an unreasonable search of its said offices and then and there seize and carry away all of its books, documents, papers, files, records, and other effects of this respondent, and did convey the same to the United States District Attorney for the Western District of New York, who now wrongfully and unlawfully detains the same, all of which more fully appears by this respondent's petition, verified on the 27th day of February, 1919, and the affidavits of Frederick W. Silverthorne and Asa K. Silverthorne both sworn to on the same day, and the affidavit of Walter H. Tobey, its Vice President and Treasurer, sworn to on the 28th day of February, 1919, in a proceeding instituted by this respondent against the said Stephen T. Lockwood, as United States District Attorney for the Western District of New York, John D. Lynn, as United States Marshal for the Western District of New York, et al., for an order of this Court

81 directing the said United States District Attorney and said United States Marshal to return the said books, papers and property to this respondent; that said petition and affidavits are incorporated herein and made a part hereof as fully and completely as though the same were set out in full. That on the 1st day of March, 1919, said proceeding came on before the Hon. John R. Hazel, United States District Judge for the Western District of New York, at a Term of the United States District Court, held at the Federal Building, in the City of Buffalo, Erie County, Western District of New York; and the said United States District Attorney and the said United States Marshal duly appeared in said proceeding and presented the affidavits mentioned in the petition and the matter was then and there fully and completely presented and argued before this Court by the counsel for the respective parties; and that thereafter and on the 3rd day of March, 1919, this Honorable Court in an opinion filed on that day, held that the said books, documents and papers were seized by the said representatives of the said United States District Attorney and the United States Marshal after an unreasonable search, and held unlegally by the said United States District Attorney; and that the said books, papers and documents should be forthwith returned to this respondent. Nevertheless the said United States District Attorney still unlawfully holds and retains the said books, papers, documents, property and effects.

Fourth. That this respondent is engaged in the business of buying and selling lumber and has a valuable good will and extensive trade with its many customers. That its books, records, documents and files are used in the conduct of said business wherein are con-

82 tained the records of its contracts, obligations, as well as a record of all accounts and bills receivable, the records of its

shipments, invoices, billings, and the many and divers matters pertaining to the conduct of business of the magnitude and character of this respondent. It is positively necessary that the respondent have the immediate possession of its books, papers, records and files in order to intelligently carry on its business, which has been greatly impaired by its deprivation of the said books, records and documents, and that your respondent has suffered and will continue to suffer damage by reason of the unlawful seizure and detention of said books, papers and documents and memoranda.

Fifth. That your respondent is a corporation organized under the Laws of the State of New York, and is obliged under the Laws of the United States to report annually its income to the United States Government to the end that a tax may be assessed as provided for by law. That the time is near at hand when such income tax report for the year ending December 31st, 1918, must be filed. That your respondent has no books, papers, memoranda or data from which such income tax report can be compiled and it depends solely and wholly upon the said books, documents and records now, so as aforesaid, unlawfully and wrongfully detained by the United States District Attorney.

Sixth. That your respondent does not desire the return of the said books, documents and records for the purpose of destroying the same, or mutilating or losing them, or mislaying them, or for moving them beyond the jurisdiction of the Court, but for the purpose of
83 conducting its business, and it has no intention of committing any of the acts feared by the United States District Attorney, and as set forth in Paragraph marked "Fourth" in the petition.

Wherefore, this respondent respectfully requests the Honorable Court to deny the petition of the petitioner and to order the books, documents and records to be forthwith returned to it.

84 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne being duly sworn, deposes and says that he is an officer, to wit, the president, of the respondent, Silverthorne Lumber Company, Inc.; that he has read the foregoing answer and knows the contents thereof; that the same are true to the personal knowledge of deponent, excepting such matters as are alleged upon information and belief, and as to those, he believes them to be true.

F. W. SILVERTHORNE.

Sworn to before me this 5th day of March, 1919.

M. W. WOOD,
Commissioner of Deeds, Buffalo, N. Y.

85 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an Order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents and property of the Silverthorne Lumber Company, a corporation.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Asa K. Silverthorne being duly sworn deposes and says:

I am upwards of twenty-one years of age and reside in the City of Buffalo, Erie County, Western District of New York. I am the General Manager of the Silverthorne Lumber Company, Inc.

When the office of the Silverthorne Lumber Company, Inc., was raided by officials of the United States under the direction of United States District Attorney Stephen T. Lockwood, and the United States Marshal John D. Lynn, many of my private papers, books and documents were seized and carried off by said United States officials in said raid.

86 It is untrue that all of the books, papers, documents and memoranda mentioned in said list marked "B" attached to the affidavits referred to in the petition of Stephen T. Lockwood, United States District Attorney, verified on the 3rd day of March, 1919, belong to the Silverthorne Lumber Company, Inc. Various of said books, records and documents belong to me personally.

If the direction of the Court to said Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, given in the opinion filed by the Court on the 3rd day of March, 1919, is carried out and the books, papers and documents of the said Silverthorne Lumber Company, Inc. are returned to it, the same will not be destroyed or removed beyond the jurisdiction of this Court, and will not, so far as I will be able to prevent the same with reasonable care and caution, be lost or mislaid.

The Silverthorne Lumber Company, Inc. requires these books and papers for the conduct of its business and for the making up of its income tax report. At the present time it is impossible to identify any shipments heretofore made by the billings as the same are in the possession of the United States District Attorney. The petitioner's business is being greatly hampered and has already been greatly impaired and unless the said books, papers and documents are returned to it it will suffer irreparable damage.

I wish to incorporate herein and make a part of this affidavit my affidavit sworn to on the 27th day of February, 1919, in the

87 proceeding instituted in this Court by the Silverthorne Lumber Company, Inc. against Stephen T. Lockwood as United States District Attorney for the Western District of New York, et al., for the return of its books, papers, documents and effects seized and

carried away by United States officials after an unreasonable search of the petitioner's premises, as fully and completely as though the same was set out herein in full.

(Sgd.) ASA K. SILVERTHORNE.

Sworn to before me this 5th day of March, 1919.

(Sgd.) M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

88 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne being duly sworn deposes and says:

I reside in the City of Buffalo, Erie County, Western District of New York, am upwards of twenty-one years of age and I am President of the Silverthorne Lumber Company, Inc.

It is untrue that all of the books, papers and documents in the list marked "B" attached to the affidavits mentioned by Stephen T. Lockwood, United States District Attorney, in his petition, verified on the 3rd day of March, 1919, are the property of the Silverthorne Lumber Company, Inc. Many of said papers belong to and are the papers and documents of Asa K. Silverthorne.

89 If the books, records and documents belonging to the Silverthorne Lumber Company, Inc. are returned to us pursuant to the direction of the Court, the same shall not be destroyed or removed beyond the jurisdiction of this Court and rendered invaluable as evidence, so far as any physical acts are concerned, and they shall not be lost or mislaid, if by the exercise of reasonable care and precaution I can avoid the same.

The company immediately requires its books, records, files and papers in order to carry on its business. It now has no books, files or records with which to carry on its business. Since the books of the company were seized and carried away by Government officials, various communications have been made to the company by its customers by reference only to invoice number. From this we are unable to identify any cars or shipments or to make proper billing or to give the proper directions in relation to the same. The conduct of the company's business is being very much impaired by the loss of its books, papers and documents and the damage to it, by reason of being deprived of its books, papers and documents, cannot be adequately ascertained.

I wish to incorporate herein and make a part of this affidavit my affidavit sworn to on the 27th day of February, 1919, in the proceeding instituted in this Court by the Silverthorne Lumber Company, Inc. against Stephen T. Lockwood as United States District Attorney for the Western District of New York, et al., for the return of its books, papers, documents and effects seized and carried
90 away by United States officials after an unreasonable search of the petitioner's premises, as fully and completely as though the same was set out herein in full.

(Signed) F. W. SILVERTHORNE.

Sworn to before me this 5th day of March, 1919.

(Sgd.) M. W. WOOD,

Commissioner of Deeds in and for the City of Buffalo, N. Y.

91 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Walter H. Tobey being duly sworn deposes and says:

I reside at North Tonawanda, New York, and am upwards of twenty-one years of age and Vice-President and Treasurer of the Silverthorne Lumber Company, Inc.

On the 25th day of February, 1919, officers, agents and servants of the United States under the direction of Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, raided the offices of the Silverthorne Lumber Company, Inc. at North Tonawanda, New York, and conducted an unreasonable search of the same and seized and carried away books, papers, documents, property and effects of the company, all of which more fully appears in my affidavit sworn to on the 28th day of Feb-
92 ruary, 1919, in a proceeding instituted in this Court by the said Silverthorne Lumber Company, Inc. against Stephen T. Lockwood, as United States District Attorney for the Western District of New York, et al., for an order compelling the return to the said Silverthorne Lumber Company, Inc. all its books, papers, documents and effects so wrongfully, as aforesaid, seized after such unreasonable search and carried away by the said United States officials, and I beg to make said affidavit a part hereof as fully and completely as though the same was set out herein in full.

I have read the list marked "B" attached to the affidavits referred to by United States District Attorney Stephen T. Lockwood in his petition, verified on the 3rd day of March, 1919, and it is untrue that

all of the said books, papers and documents mentioned in said list belong to the petitioner, Silverthorne Lumber Company, Inc., but in truth and in fact many of said documents and papers belong to Asa K. Silverthorne personally.

My principal work for the Silverthorne Lumber Company, Inc. is the keeping of the company's books, papers and documents, and I have direct charge of them.

The fear of the United States District Attorney set forth in his petition that the books, papers and documents of the company mentioned and described in said list marked "B" will be lost, mis-
93 laid, destroyed or moved beyond the jurisdiction and rendered invaluable as evidence is wholly unfounded and the same will not be destroyed or removed, so far as I can prevent the same by the exercise of reasonable care and precaution.

The company requires these books immediately. I am now keeping the company's transactions upon a pad. I have no books of account whatsoever. It is impossible to carry on any intelligent correspondence with the company's customers in relation to past orders or shipments, or to properly invoice or bill shipments or to follow directions given by customers who frequently only refer to invoice or the invoice numbers, as all of such invoices and orders are included with the other books now wrongfully held by the United States District Attorney.

Furthermore, when the books, papers and documents were thus wrongfully seized, I was about to prepare a report on the income tax of the company to be filed with the Internal Revenue office in the Federal Building, in the City of Buffalo, New York. This report cannot be prepared until the books are returned.

(Sgd.) WALTER H. TOBEY.

Sworn to before me this 5th day of March, 1919.

(Sgd.) M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

94 United States District Court, Western District of New York.

In the Matter of the Petition of STEPHEN T. LOCKWOOD, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court in and for the Western District of New York certain books, papers, documents, and property of the Silverthorne Lumber Company, a corporation.

Stephen T. Lockwood, attorney of the United States, in and for the Western District of New York, having filed his duly verified petition, upon which a rule was entered directing Silverthorne Lumber Company, Inc., to show cause, at a term of this court, appointed to be held at the Federal Building, in the City of Buffalo, County of Erie, in the Western District of New York, on the 5th day of March, 1919, at two o'clock in the afternoon, or as soon thereafter as counsel could be heard, why said books, papers and documents of the Silver-

thorne Lumber Company, Inc., then in possession of the United States District Attorney, and directed to be returned to the said Silverthorne Lumber Company, Inc., should not forthwith be impounded in the custody of the law for use upon the Grand Jury proceedings against John Doe, and for use upon the trial of any indictment found by said Grand Jury by virtue of said proceedings; and on said 5th day of March, said Silverthorne Lumber Company, Inc., having appeared by Henry W. Killeen and James O. Moore,
95 its counsel, and filed its answer to said petition, and the affidavits of Asa K. Silverthorne, Frederick W. Silverthorne and Walter H. Tobey, all sworn to on the 5th day of March, 1919, and the petitioner appearing by Carl Sherman, Assistant United States District Attorney, and after hearing the respective counsel, and after due deliberation,

Now, on motion of Penney, Killeen & Nye, it is

Ordered that the said rule to show cause be, and the same hereby is, in all respects denied.

(Signed) JOHN R. HAZEL,
United States Judge.

March 6, 1919.

96 The President of the United States to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, That all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo, on the 11th day of March, 1919, at ten o'clock in the forenoon to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be Journals of Silverthorne Lumber Co., Inc., marked Journal No. 2 and Journal No. 3, for the period commencing Jan. 1st, 1918, and ending March 1st, 1919. Ledgers of Silverthorne Lumber Co., Inc., showing current accounts of said Silverthorne Lumber Co., Inc., for the period commencing Jan. 1st, 1918, and ending March 1st, 1919. Check and check stub books of Silverthorne Lumber Co., Inc., for period commencing July 1st, 1918, and ending March 1st, 1919. Invoice copy books of Silverthorne Lumber Co., Inc., for period commencing July 1st, 1918, and ending March 1st, 1919. Stock certificate book of Silverthorne Lumber Co., Inc. Stock book of
97 Silverthorne Lumber Co., Inc. Minute book of Silverthorne Lumber Co., Inc., for period Jan. 1, 1918, to March 1, 1919, now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the
Western District of New York.

98 The President of the United States to Silverthorne Lumber Company, Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, That all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo, on the 11th day of March, 1919, at ten o'clock in the forenoon to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be

1 bank book marked "Fred'k Robertson & Co. Bankers North Tonawanda, New York, in account with Silverthorne Lumber Co. Inc. Special, covering period from December 28, 1917, to November 1st, 1918, both inclusive; also paid checks of Silverthorne Lumber Company Special Account paid through Fred'k Robertson & Company Bankers, North Tonawanda, numbered and dated as follows:

No. 5280, Sept. 27, 1918, payable to Cash for $500.00, signed by Silverthorne Lumber Company, Inc., A. K. Silverthorne President.

99 No. 5281, Sep 26 1918, payable to Silverthorne Lumber Co. Inc., amount $2292.88, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President; endorsed on back "Pay to the Order of Fred'k Robertson & Co. Bankers, North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co. Inc."

No. — Oct. 14 1918, payable to Cash, amount $9824.31, signed by Silverthorne Lu Co Inc Special A K Silverthorne.

No. — Oct 15 1918, payable to Cash, amount $5258.00, signed by Silverthorne Lu Co Inc A K Silverthorne Pres Spec

No. 5275 Oct 18 1918, payable to Cash, amount $974.89, signed by Silverthorne Lumber Company, Inc. Special A K Silverthorne President Spec

No. — Oct 21 1918, payable to Cash (Dft A J Wright & Co.) amount $769.75, signed by Silverthorne Lu Co. Inc Special A K Silverthorne Pres

No. 5272 Oct 24 1918, payable to Fredk Robertson & Co., amount $10,000.00 signed by Silverthorne Lumber Company, Inc., A K Silverthorne President

No. 5271 Oct 25 1918, payable to order of Dft for F. J. Shields, amount $1000.00, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne, President.

No. 5277 Oct 5 1918, payable to Silverthorne Lumber Co., Inc. amount $159.74, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne, President; endorsed on back "Pay to the order of Fred'k Robertson & Co. Bankers, North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co., Inc."

No. — Nov 12 1918, payable to Cash amount $55.60, signed by Silverthorne Lu Co Inc A K Silverthorne.

No. 5270, Nov 1, 1918, payable to Cash, amount $200.00, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne, President.

now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided
100 by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the
Western District of New York.

101 The President of the United States to Silverthorne Lumber Company, Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building in the City of Buffalo, on the 11th day of March, 1919, at 10 o'clock in the forenoon to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe, and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be Tally-book showing tally of shipments of lumber by Silverthorne Lumber Company, Inc. to Shingle Mills Selling Company, and United States Railroad Administration operating the Lehigh Valley, Erie, N. Y. Central, Philadelphia & Reading and D. L. & W. Railroads, for the period commencing Jan. 1st, 1918, and ending March 1st, 1919, which tally-books are numbered and described as follows:

No. 1 Exhibit 63.
No. 1 " 83.
No. 2 " No. 59.
No. 3 " " 68.
No. 4 " " 17.
No. 5 " " 60.

102

No. 5 Exhibit No. 66.
" 6 " " 72.
" 7 " " 18.
" 8 " " 21.
" 9 " " 20.
" 10 " " 67.
" 11 " " 71.
" 11 " " 76.
" 12 " " 27.
" 12 " " 77.
" 15 " " 5.
" 16 " " 6.
" 17 " " 7.
" 20 " " 4.
" 26 " " 28.
" 10 " " 69.
" 36 " " 29.
" 10 " " 70.
" 36 " " 74.
" 10 " " 70.
" 36 " " 74.
" 39 " " 57.
" 36 " " 73.
" 6 " " 64.
37 " " 75.
7 " " 26.
50 " " 61.
24 " " 62.
19 " " 9.
3 " " 19.
27 " " 16.
61 " " 56.
18 " " 8.

now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the Western District of New York.

103 The President of the United States to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo, on the 11th day of March, at ten o'clock in the forenoon to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be

1. Cancelled check vouchers of account of Silverthorne Lumber Company, Inc., with Frederick K. Robertson & Company, Bankers, North Tonawanda, N. Y., for period commencing January 1st, 1918, and ending March 1, 1919.

2. Inspection reports of cars of lumber shipped by Silverthorne Lumber Company, Inc., as follows: on car No. 3665 initialed P. & K. dated Jan. 11, 1919; on car No. 335943 initialed Sou; on car No. 32054 initialed Sou, dated 10/18/18; on car No. 234129, initialed N. Y. C. dated 10/18/18: and on all cars of lumber shipped
104 between Jan. 1st, 1918, and March 1st, 1919.

3. Bills of Lading and Copies of bills of lading for shipments of lumber to and by Silverthorne Lumber Company, Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the Western District of New York.

105 The President of the United States to Silverthorne Lumber Co. Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, That all business and excuses being laid aside you appear and attend before the Judge of the District Court of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo, on the 11th day of March, at ten o'clock in the forenoon to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be

1. Bill of lading receipts for cars of lumber shipped by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

2. Freight bills, letters and copies of letters, invoices and copies of invoices, relating to shipments of lumber received and shipped by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

3. Receipts for payment by Silverthorne Lumber Co., Inc., for lumber for period commencing Jan. 1st, 1918, and ending March 1, 1919.

106 4. Record of profits and losses on shipments of lumber by Silverthorne Lumber Co., Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the Western District of New York.

107 The President of the United States to Silverthorne Lumber Company, Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, That all business and excuses being laid aside you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York; at a District Court to be held at the United States Court House and Post Office Building, in the City of Buffalo, on the 11th day of March, 1919, at ten o'clock in the forenoon to testify and

give evidence in regard to an alleged violation of the statutes of the United States by John Doe and not to depart the court without leave thereof or of the District Attorney, and that you bring with you, and then and there produce those certain papers purporting to be Order cards of shipments of lumber by Silverthorne Lumber Company, Inc., to Shingle Mills Selling Company and United States Railroad Administration operating the Lehigh Valley, Erie, N. Y. Central, Philadelphia & Reading and D. L. & W. Railroads, for the period commencing January 1st, 1918, and ending March 1st, 1919, which cards are numbered and recorded as follows:

Record No. 108, customer's order 32961
" " 244, " " G. P. 3146
" " 144, " " 1370-Y
" " 179, " " 3374-L
" " 56, " " 7944, endorsed Thos. E. Coal Lumber Co. with 6 cards attached.

108

Record No. 275, customer's order 3377
" " 271, " " 19
" " 248, " " 47633
" " 220, " " 9625, marked Thos. E. Coale Lum. Co.
" " 264, " " 12
" " 261, " 52697
" " 241, " 44417
" " 237, " 44419
" " 236, " 44428, with extra card attached.
" " 234, " 44401
" " 232, " 44402
" " 231, " 42183
" " 227, " 39593
" " 191, " 33325
" " 193, " ..... marked Erie R. R. Co. care C. D. Dearworth, Huntington, Indiana.
" " 190, " 33313
" " 188, " 33300
" " 163, " 26787
" " 124, " 20945 with sheet attached.
" " 122, " 20932
" " 105, " 15043
" " 50, " 6484
" " 11, " 56720
" " 3, " 218
" " 181, " 1751, marked Shingle Mills Selling Co. with three cards attached.

now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control.

And this you are not to omit, under the penalties provided by law.

Witness, Hon. John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 7th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney for the Western District of New York.

109 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against John Doe.

The Petitioner, Silverthorne Lumber Company, Inc., having filed its petition, duly verified on the 11th day of March, 1919, wherein it satisfactorily appears that six subpœnas duces tecum have been served upon the petitioner, requiring it to produce all of its books, papers and documents before this court, in a proceeding against John Doe, for a violation of the Statutes of the United States, at ten o'clock in the forenoon on the 11th day of March, 1919, and that said subpœnas duces tecum, or some of them, may be invalid by reason of the matters and facts set forth in said petition, and

Upon motion of Penney, Killeen & Nye, attorneys for the petitioner, it is

Ordered, that Stephen T. Lockwood, United States District Attorney for the Western District of New York, show cause at a term of this court appointed to be held on the 18th day of March, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said six subpœnas duces tecum should not be vacated and set aside, and the petitioner excused from complying with the same, or with any of them, and why the petitioner should not have such other and further relief as to the court may seem
110 proper in the premises, and it is further

Ordered, that until after the hearing and determination of this rule to show cause, the petitioner and its officers and agents are excused from complyng with said six subpœnas duces tecum.

Service of this rule, upon Stephen T. Lockwood, United States District Attorney, by delivering a copy thereof to him on or before three o'clock in the afternoon of the eleventh day of March, 1919, shall be sufficient.

Dated, March 11, 1919.

JOHN R. HAZEL,
United States District Judge.

111 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against John Doe.

The petition of Silverthorne Lumber Company, Inc., respectfully shows:

1. Your petitioner is a corporation organized under the laws of the State of New York, engaged in the lumber business at North Tonawanda, N. Y., and has been such corporation so engaged, for several years last past.

2. On or about February 25, 1919, one Frederick W. Silverthorne, the President of your petitioner, and one Asa K. Silverthorne, the General Manager of your petitioner, were arrested upon a charge of violation of Section 37 of the Penal Laws, and on the same day were taken before a United States Commissioner, where they gave bail and demanded a hearing; that no hearing has yet been had, but the said proceeding has been adjourned from time to time, upon the request of the prosecution.

3. On the same day, and at the same time, or about the same time as the time of the arraignment aforesaid, deputy United States marshals, and others, invaded the office of your petitioner, and, pretending to act by the authority, or under the color of a subpœna duces tecum, unlawfully searched the premises of your petitioner,
112 seized its books, papers and documents, and took and carried the same away; thereafter your petitioner commenced a proceeding for the return of its books, papers and documents, and said Asa K. Silverthorne at the same time commenced a proceeding for the return of the books, papers and documents belonging to him, which were also unlawfully seized and carried away, and that said proceedings resulted in orders directing the return of all of such books, papers and documents, which orders were granted and entered on or about March 5 and 6, 1919, respectively.

4. Thereupon, the United States District Attorney returned part, but not all, of the papers, books and documents so unlawfully seized and taken, and many of the books, papers and documents so theretofore unlawfully seized and taken, have not been returned, but are withheld, and your petitioner is about to take steps to compel compliance with the order aforesaid and to secure a return of all said books, papers and documents belonging to your petitioner, and the said Asa K. Silverthorne is about to do likewise in his own behalf.

5. On the 8th day of March, 1919, at about or after two o'clock in the afternoon, several subpœnas directed to your petitioner, were delivered to and served upon one Walter H. Tobey, and that said subpœnas directed your petitioner to appear and attend before the Judge of the District Court of the United States of America, for the Western District of New York, at a District Court to be held at the United States Court House, situate in the Post Office Building at

Buffalo, N. Y., on the 11th day of March, 1919, at ten o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe, and
113 to bring with it and then and there produce, certain papers described in the six subpœnas duces tecum, which include all of the petitioner's books, papers and documents returned to Henry W. Killeen, Esq., attorney and counselor for the petitioner and Asa K. Silverthorne, by Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, both for the Western District of New York, pursuant to the two aforementioned orders; that said six subpœnas served upon your petitioner are ready to be produced as this court may direct.

6. Your petitioner further shows to this honorable court that the books, papers and documents required by said six subpœnas duces tecum to be produced, constitute all of the books, papers and documents of the petitioner, which are in its or its attorneys' possession, and also many of the books, papers and documents belonging to Asa K. Silverthorne personally, and that your petitioner will be unable to carry on its business intelligently, to prepare its income tax report, to fill its orders, and to generally meet the daily requirements of its current orders for shipping, unless it retains possession of said books, papers and documents.

7. Your petitioner further shows to this Honorable Court that Stephen T. Lockwood, United States District Attorney, his assistants, agents and representatives, acquired the knowledge of the books, papers and documents specified in said six subpœnas duces tecum, illegally, and in violation of your petitioner's constitutional rights and privileges, and particularly in violation of the immunities afforded to your petitioner under the fourth amendment of the Constitution of the United States, in that the said Stephen T.
114 Lockwood, United States District Attorney, represented by certain United States Marshals, and other persons, after an unreasonable search of your petitioner's premises and offices, seized and carried away on the 25th day of February, 1919, all of its books, papers and documents, and said Stephen T. Lockwood, United States District Attorney, did then and there detain said books, papers and documents and refused to turn the same over to your petitioner, or to the said Asa K. Silverthorne, and did personally, and by assistant United States District Attorneys, his agents, servants and representatives, examine the said books, papers and documents, make copies and excerpts therefrom, and generally learn the contents of said books, papers and documents, and did then and there, between the time of the taking of said papers and the 6th day of March, 1919, ascertain all of the information, facts and data set forth in the said six subpœnas duces tecum.

8. Your petitioner further shows that it has had no business or transactions of any kind or character with any person by the name of John Doe, and has no knowledge or information of any facts concerning him, or his business, or his conduct, or any crimes he has committed, and that its books, papers and documents contain no information or data of any kind or character, relating to any person

by the name of John Doe, or any name similar thereto, and that your petitioner knows of no criminal proceeding against any person by the name of John Doe, and upon information and belief, alleges that there is no proceeding in fact being carried on or conducted in the United States District Court for the Western District of New York, or before the Grand Jury thereof, against any person by the
115 name of John Doe, and your petitioner respectfully refers to this honorable court the inquiry as to whether any such person as John Doe does in fact exist, and as to whether there is any proceeding of any character now pending in this court against said John Doe.

9. And your petitioner charges that the said six subpœnas duces tecum, and each of them, are colorable, in that said Stephen T. Lockwood, United States District Attorney, has caused to be issued six several subpœnas, each requiring the production of various books, papers and documents, and that all of the six subpœnas require the production of all your petitioner's books, papers and documents which were taken in the said unlawful raid, and which this Honorable Court declared to be an unreasonable search and seizure of your petitioner's papers and effects, and that the said United States District Attorney thereby attempted to accomplish by six several subpœnas duces tecum, what could not be accomplished by a single subpœna. All six of said subpœnas duces tecum were served upon your petitioner's Vice President and Treasurer, Walter H. Tobey.

10. And your petitioner charges that said six subpœnas duces tecum are illegal and invalid for the following reasons:

(*a*) That said six subpœnas, regarded as a single subpœna, are unreasonable in that they require the production of all your petitioner's books, papers and documents pertaining to its business, which has extended over a period of nearly five years, and that if your petitioner is compelled to comply with said subpœna it will amount to an unreasonable search and seizure, in violation of the fourth amendment of the Constitution of the United States.

116 (*b*) That said six subpœnas are illegal, in that they severally require the production of the books, papers and documents belonging personally to Asa K. Silverthorne, its general manager, who has been arrested on a warrant sworn out before United states Commissioner, George A. Keating, as aforesaid.

(*c*) That said subpœna is illegal in that it requires the production of your petitioner's books, papers and documents, which may be used to incriminate it, and therefore, is in violation of the fifth amendment of the Constitution of the United States.

(*d*) That said six several subpœnas duces tecum are illegal and invalid, in that they deny to your petitioner due process of law afforded by the Constitution of the United States and the amendments thereof.

(*e*) That said six several subpœnas duces tecum are illegal, in that they deny to your petitioner the equal protection of the laws as guaranteed to it by the Constitution of the United States and the amendments thereof.

(*f*) That said six several subpœnas are illegal, in that there is no

proceeding pending, or to be presented, against any person named John Doe, before the Judge of the District Court of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House, situate in the Post Office Building in the City of Buffalo on the 11th day of March, 1919, at ten o'clock in the forenoon, or at any other time during that day, or thereafter, said John Doe being a mere fiction and not a person who has committed any crime or offense against the statutes
117 of the United States.

(*g*) That said six several subpœnas duces tecum are illegal, in that sufficient time was not allowed to enable the petitioner to properly comply therewith.

(*h*) That said six several subpœnas duces tecum are illegal and invalid, and are unreasonable, in that the United States District Attorney, Stephen T. Lockwood, his agents, assistants and representatives, and John D. Lynn, the United States Marshal, have not complied with the orders granted by this Honorable Court, directing the return to your petitioner and to Asa K. Silverthorne, of the books, papers and documents taken in said unlawful raid.

(*i*) That said six several subpœnas duces tecum are illegal and invalid, in that the knowledge and information of the books, papers and documents therein specified to be produced, was illegally obtained, and used by the United States Government officials, including Stephen T. Lockwood, United States District Attorney, by and after an unreasonable search and seizure of your petitioner's papers and effects on February 25, 1919.

Wherefore, your petitioner prays that a rule be directed to Stephen T. Lockwood, United States District Attorney for the Western District of New York, requiring him to show cause before this Honorable Court, why said subpœnas duces tecum should not be set aside and declared of no effect, and your petitioner excused from complying with said subpœnas duces tecum, or any of them, and
118 that your petitioner have such other and further relief as to the court may seem proper in the premises.

And your petitioner will ever pray, etc.

SILVERTHORNE LUMBER COMPANY, INC.,
By FREDERICK W. SILVERTHORNE,
Its President.

119 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, says that he is an officer, to wit, the president, of the petitioner, Silverthorne Lumber Company, Inc., in the above entitled proceeding; that he has read the foregoing petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 11th day of March, 1919.

M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

120 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against John Doe.

The amended and supplemental petition of Silverthorne Lumber Company, Inc., respectfully shows:

1. Your petitioner is a corporation organized under the laws of the State of New York, engaged in the lumber business at North Tonawanda, N. Y., and has been such corporation so engaged, for several years last past.

2. On or about February 25, 1919, one Frederick W. Silverthorne, the President of your petitioner, and one Asa K. Silverthorne, the General Manager of your petitioner, were arrested upon a charge of violation of Section 37 of the Penal Laws, and on the same day were taken before a United States Commissioner, where they gave bail and demanded a hearing; that no hearing has yet been had, but the said proceeding has been adjourned from time to time, upon the request of the prosecution.

3. On the same day, and at the same time, or about the same time as the time of the arraignment aforesaid, deputy United
121 States Marshals, and others, invaded the office of your petitioner, and, pretending to act by the authority, or under the color of a subpœna duces tecum, unlawfully searched the premises of your petitioner, seized its books, papers and documents, and took and carried the same away; thereafter your petitioner commenced a proceeding for the return of its books, papers and documents, and said Asa K. Silverthorne at the same time commenced a proceeding for the return of the books, papers and documents belonging to him, which were also unlawfully seized and carried away, and that said proceedings resulted in orders directing the return of all of such books, papers and documents, which orders were granted and entered on or about March 5 and 6, 1919, respectively.

4. Thereupon, the United States District Attorney returned part, but not all, of the papers, books and documents so unlawfully seized and taken, and many of the books, papers and documents so theretofore unlawfully seized and taken, have not been returned, but are withheld, and your petitioner is about to take steps to compel compliance with the order aforesaid and to secure a return of all said books, papers and documents belonging to your petitioner, and the said Asa K. Silverthorne is about to do likewise in his own behalf.

5. On the 8th day of March, 1919, at about or after two o'clock in the afternoon, several subpœnas directed to your petitioner, were

delivered to and served upon one Walter H. Tobey, and that said subpœnas directed your petitioner to appear and attend before the

Judge of the District Court of the United States of America,
122 for the Western District of New York, at a District Court to be held at the United States Court House, situated in the Post Office Building at Buffalo, N. Y. on the 11th day of March, 1919, at ten o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe, and to bring with it and then and there produce, certain papers described in the six subpœnas duces tecum, which include all of the petitioner's books, papers and documents returned to Henry W. Killeen, Esq., attorney and counselor for the petitioner and Asa K. Silverthorne, by Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, both for the Western District of New York, pursuant to the two aforementioned orders; that said six subpœnas served upon your petitioner are ready to be produced as this court may direct.

6. Your petitioner further shows to this honorable court that the books, papers and documents required by said six subpœnas duces tecum to be produced, constitute all of the books, papers and documents of the petitioner, which are in its or its attorneys' possession, and also many of the books, papers and documents belonging to Asa K. Silverthorne personally, and that your petitioner will be unable to carry on its business intelligently, to prepare its income tax report, to fill its orders, and to generally meet the daily requirements of its current orders for shipping, unless it retains possession of said books, papers and documents.

7. Your petitioner further shows to this Honorable Court
123 that Stephen T. Lockwood, United States District Attorney, his assistants, agents and representatives, acquired the knowledge of the books, papers and documents specified in said six subpœnas duces tecum, illegally, and in violation of your petitioner's constitutional rights and privileges, and particularly in violation of the immunities afforded to your petitioner under the 4th amendment of the Constitution of the United States, in that the said Stephen T. Lockwood, United States District Attorney, represented by certain United States Marshals, and other persons, after an unreasonable search of your petitioner's premises and offices, seized and carried away on the 25th day of February, 1919, all of its books, papers and documents, and said Stephen T. Lockwood, United States District Attorney, did then and there detain said books, papers and documents and refused to turn the same over to your petitioner, or to the said Asa K. Silverthorne, and did personally, and by assistant United States District Attorneys, his agents, servants and representatives, examine the said books, papers and documents, make copies and excerpts therefrom, and generally learn the contents of said books, papers and documents, and did then and there, between the time of the taking of said papers and the 6th day of March, 1919, ascertain all of the information, facts and data set forth in the said six subpœnas duces tecum.

8. Your petitioner further shows that it has had no business or transactions of any kind or character with any person by the name of John Doe, and has no knowledge or information of any facts concerning him, or his business, or his conduct, or any crimes he
124 has committed, and that its books, papers and documents contain no information or data of any kind or character, relating to any person by the name of John Doe, or any name similar thereto, and that your petitioner knows of no criminal proceeding against any person by the name of John Doe, and upon information and belief, alleges that there is no proceeding in fact being carried on or conducted in the United States District Court for the Western District of New York, or before the Grand Jury thereof, against any person by the name of John Doe, and your petitioner respectfully refers to this honorable court the inquiry as to whether any such person as John Doe does in fact exist, and as to whether there is any proceeding of any character now pending in this court against said John Doe.

9. And your petitioner charges that the six subpœnas duces tecum, and each of them are colorable, in that said Stephen T. Lockwood, United States District Attorney has caused to be issued six several subpœnas, each requiring the production of various books, papers and documents, and that all of the six subpœnas require the production of all your petitioner's books, papers and documents which were taken in the said unlawful raid, and which this Honorable Court declared to be an unreasonable search and seizure of your petitioner's papers and effects, and that the said United States District Attorney thereby attempted to accomplish by six several subpœnas duces tecum, what could not be accomplished by a single subpœna. All six of said subpœnas duces tecum were served upon your petitioner's Vice-President and Treasurer, Walter H. Tobey.

125 10. That since the commencement of this proceeding the Grand Jurors of this court have returned an indictment against your petitioner and others for an alleged conspiracy to defraud the United States, all of which more fully appears by the said indictment on file with the Clerk of this court. That your petitioner's books, papers and documents, unlawfully seized, as aforesaid, were used by the United States District Attorney, while so unlawfully held and detained by him as aforesaid, and were presented to the said Grand Jurors which found said indictment and *was* unlawfully used as evidence before them against your petitioner, all of which more fully appears by the affidavit of Stephen T. Lockwood, United States District Attorney, sworn to on the 1st day of March, 1919, and the affidavits of other government officials and agents accompanying the same, in a proceeding instituted before this court by your petitioner for the recovery of its said books, papers and documents, as aforesaid, to which reference is hereby made, said affidavits being on file with the clerk of this court, and ready to be produced as this court may direct.

That, upon information and belief, said United States District Attorney intends to use your petitioner's books, papers and documents called for by said six subpœnas to compel your petitioner to be a

witness itself and to incriminate itself; and that the said United States District Attorney intends to introduce said books before the present Grand Jury of this court for the purpose of finding further indictments against your petitioner. Your petitioner's information is based upon said affidavits furnished by the said United
126 States District Attorney and his agents and representatives, and statements made by the said United States District Attorney and his assistants to the effect that such books, papers and documents were to be used to incriminate your petitioner and to be introduced in evidence against it.

That your petitioner fears that said books, papers and documents required to be produced before the said Grand Jury by the United States District Attorney may tend to incriminate it, and, therefore, seeks the constitutional privilege and guarantees protecting it from unlawful searches and seizures and protecting it from being compelled to be a witness against itself.

11. And your petitioner charges that said six subpœnas duces tecum are illegal and invalid for the following reasons:

(*a*) That said six subpœnas, regarded as a single subpœna, are unreasonable in that they require the production of all your petitioner's books, papers and documents pertaining to its business, which has extended over a period of nearly five years, and that if your petitioner is compelled to comply with said subpœna it will amount to an unreasonable search and seizure, in violation of the 4th amendment of the Constitution of the United States.

(*b*) That said six subpœnas are illegal, in that they severally require the production of the books, papers and documents belonging personally to Asa K. Silverthorne, its general manager,
127 who has been arrested on a warrant sworn out before United States Commissioner, George A. Keating, as aforesaid.

(*c*) That said subpœna is illegal in that it requires the production of your petitioner's books, papers and documents, which may be used to incriminate it, and therefore is in violation of the 5th amendment of the Constitution of the United States.

(*d*) That said six several subpœnas duces tecum are illegal and invalid, in that they deny to your petitioner due process of law afforded by the Constitution of the United States and the amendments thereof.

(*e*) That said sir several subpœnas duces tecum are illegal, in that they deny to your petitioner the equal protection of the laws as guaranteed to it by the Constitution of the United States and the amendments thereof.

(*f*) That said six several subpœnas are illegal, in that there is no proceeding pending, or to be presented, against any person named John Doe, before the Judge of the District Court of the United States of America for the Western District of New York, at a District Court to be held at the United States Court House, situate in the Post Office Building in the City of Buffalo on the 11th day of March, 1919, at ten o'clock in the forenoon, or at any other time during that day, or thereafter, said John Doe being a mere fiction

and not a person who has committed any crime or offense
128 against the statutes of the United States.

(*g*) That said six several subpœnas duces tecum are illegal, in that sufficient time was not allowed to enable the petitioner to properly comply therewith.

(*h*) That said six several subpœnas duces tecum are illegal and invalid, and are unreasonable, in that the United States District Attorney, Stephen T. Lockwood, his agents, assistants and representatives, and John D. Lynn, the United States Marshal, have not complied with the orders granted by — Honorable Court, directing the return to your petitioner and to Asa K. Silverthorne, of the books, papers and documents taken in said unlawful raid.

(*i*) That said six several subpœnas duces tecum are illegal and invalid, in that the knowledge and information of the books, papers and documents therein specified to be produced, was illegally obtained, and used by the United States Government officials, including Stephen T. Lockwood, United States District Attorney, by and after an unreasonable search and seizure of your petitioner's papers and effects on February 25, 1919.

(*j*) That said subpœnas are illegal and unenforcible in that the productions of the books, papers and documents required to be produced might incriminate or tend to incriminate your petitioner, and your petitioner, therefore, pleads its privilege from being compelled to be a witness in any proceeding against itself for the
129 purpose of incriminating itself.

Wherefore, your petitioner prays that a rule be directed to Stephen T. Lockwood, United States District Attorney for the Western District of New York, requiring him to show cause before this Honorable Court, why said subpœna duces tecum should not be set aside and declared of no effect, and your petitioner excused from complying with said subpœna duces tecum, or any of them, and that your petitioner have such other and further relief as to the court may seem proper in the premises.

And your petitioner will ever pray, etc.

SILVERTHORNE LUMBER COMPANY, INC.,

(Signed) By ANTHONY W. BRICK, *Its Secretary.*

130 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Anthony W. Brick being duly sworn, says that he is an officer, to-wit, the Secretary, of the petitioner, Silverthorne Lumber Company, Inc., in the above entitled proceeding; that he has read the foregoing petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) ANTHONY W. BRICK.

Sworn to before me this 18th day of March, 1919.
(Signed) M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

131 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against John Doe.

STATE OF NEW YORK,
Western District of New York,
County of Erie, City of Buffalo, ss:

Anthony W. Brick, being duly sworn deposes and says:
I am upwards of twenty-one years of age, reside at North Tonawanda, Niagara County, New York, and am the Secretary of the Silverthorne Lumber Company, Inc.

The capital stock of the Silverthorne Lumber Company, Inc. consists of 1500 shares of the par value of $100.00 each, all common stock, and $131,100 par value of such stock has been issued and is outstanding. That the owners of such stock are: Mattie F. Silverthorne, wife of Asa K. Silverthorne and mother of Frederick W. Silverthorne, 1047 shares; Frederick W. Silverthorne 205 shares; Anthony W. Brick 2 shares; Walter H. Tobey 8 shares; and C. N. Richard
132 of Cleveland, Ohio, a son-in-law of Asa K. Silverthorne and Mattie F. Silverthorne, 49 shares.

All of the capital stock in the said company is held by Mrs. Mattie F. Silverthorne, or by members of her family, excepting the shares of stock held by Mr. Tobey and myself.
(Signed) ANTHONY W. BRICK.

Sworn to before me this 18 day of March, 1919.
(Signed) M. W. WOOD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

133 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against John Doe.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Carl B. Sherman, being duly sworn deposes and says:
That he is an Assistant United States District Attorney for the Western District of New York; that he has had personal charge of

the return to the Silverthorne Lumber Company, Inc. of certain books, papers and documents described in an order of this Court, dated the 6th day of March, 1919; that on the said 6th day of March, 1919, deponent was personally present when said books, papers and documents of the Silverthorne Lumber Company, Inc. were returned to the office of Henry W. Killeen, Attorney for the said Silverthorne Lumber Company, Inc.; that deponent believes that all of the books, papers and documents taken from the office of the Silverthorne Lumber Company, Inc. on the 25th day of February, 1919, were
134 taken to the office of the United States Attorney. That all of the papers ever received by the United States Attorney have been returned to the Silverthorne Lumber Company, Inc. and Asa K. Silverthorne, with the exception of one (1) black memorandum book, being the personal property of Asa K. Silverthorne, and taken from Asa K. Silverthorne at the time of his arrest.

That the John Doe mentioned in the six subpœnas duces tecum served on the Silverthorne Lumber Company, Inc. on the 6th day of March, 1919, is a fictitious name, and at the time the said subpœnas duces tecum were issued and served, deponent did not know the names of all the persons who might be implicated in the transactions, being investigated by the Grand Jury, concerning which said subpœnas duces tecum were issued.

That said subpœnas duces tecum do not require the production of any of the personal papers and documents of Asa K. Silverthorne, excepting as they are the corporation records of the Silverthorne Lumber Company, Inc. That deponent begs to refer to said original subpœnas duces tecum in that regard.

(Signed) CARL SHERMAN.

Subscribed and sworn to before me this 18 day of March ,1919.

(Signed) FRANCIS E. KERWIN,
Notary Public, Erie Co. N. Y.

135 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses be- laid aside you appear before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held in the United States Court House and Post Office Building, in the City of Buffalo, on the 24th day of March, 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

1 bank book marked "Fred'k Robertson & Co. Bankers North Tonawanda New York in account with Silverthorne Lumber Co. Inc. Special, covering period from December 28 1917 to November 1st 1918, both inclusive; also paid checks of Silverthorne Lumber Company Special Account paid through Fred'k Robertson & Company, Bankers, North Tonawanda, numbered and dated as follows:

No. 5280, Sept. 27, 1918, payable to Cash for $500.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5281, Sep 26 1918, payable to Silverthorne Lumber Co. Inc., amount $2292.88, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President; endorsed on back "Pay to the Order of Fred'k Robertson & Co. Bankers, North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co. Inc."

No —, Oct. 14, 1918, payable to Cash, amount $9824.31 signed by Silverthorne Lu Co Inc Special A. K. Silverthorne.

No. — Oct. 15, 1918, payable to Cash, amount $5258.00 signed by Silverthorne Lu Co Inc A. K. Silverthorne Pres. Spec.

136 No. 5275 Oct. 18, 1918, payable to Cash, amount $974.89 signed by Silverthorne Lumber Company, Inc. Special A. K. Silverthorne President Spec.

No. — Oct. 21, 1918, payable to Cash (Dft. A. J. Wright & Co.) amount $769.75, signed by Silverthorne Lu Co Inc Special A. K. Silverthorne Pres.

No. 5272 Oct. 24, 1918, payable to Fred'k Robertson & Co., amount $10,000.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5271 Oct. 25, 1918, payable to order of Dft for F. J. Shields, amount $1000.00, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5277 Oct. 5, 1918, payable to Silverthorne Lumber Co., Inc. amount $159.74, signed Silverthorne Lumber Company, Inc. A. K. Silverthorne President; endorsed on back "Pay to the order of Fred'k Robertson & Co. Bankers North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co., Inc."

No. —, Nov. 12, 1918, payable to Cash amount $55.60, signed by Silverthorne Lu. Co. Inc A. K. Silverthorne.

No. 5270, Nov. 1, 1918, payable to Cash, amount $200.00 signed by Silverthorne Lumber Company, Inc., A. K. Silverthorne President;

in regard to an alleged violation of the statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne.

And for failure to produce the aforesaid documents you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

Witness, the Honorable John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 19th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

137 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear before the Grand Inquest of the Body of the People of the United State of America, for the Western District of New York, at a District Court, to be held in the United States Court House and Post Office Building, in the city of Buffalo, on the 24th day of March, 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

1. Bill of lading receipts for cars of lumber shipped by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.
2. Freight bills, letters and copies of letters, invoices and copies of invoices, relating to shipments of lumber received and shipped by Silverthorne Lumber Co., Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.
3. Receipts for payments by Silverthorne Lumber Co. Inc. for lumber for period commencing Jan. 1st, 1918, and ending March 1, 1919.
4. Record of profits and losses on shipments of lumber by Silverthorne Lumber Co. Inc. for period commencing Jan. 1st, 1918, and ending March 1st, 1919;

in regard to an alleged violation of the Statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne.

And, for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

138 Witness, the Hon. John R. Hazel, Judge of the United States District Court, at the City of Buffalo, in the said Western District of New York, on the 19th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

139 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear before the Grand Inquest of the Body of the People of the United States of America, for the Western District of New York, at a District Court, to be held in the United States Court House and Post Office Building, in the City of Buffalo, on the 24th day of March, 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

1. Journals of Silverthorne Lumber Co. Inc. marked Journal No. 2 and Journal No. 3, for the period commencing Jan. 1st, 1918, and ending March 1st, 1919.

2. Ledgers of Silverthorne Lumber Co. Inc. showing current accounts of said Silverthorne Lumber Co. Inc. for the period commencing Jan. 1st, 1918, and ending March 1st, 1919.

3. Check, and check stub books of Silverthorne Lumber Co. Inc. for period commencing July 1st, 1918, and ending March 1st, 1919.

4. Invoice copy books of Silverthorne Lumber Co. Inc. for period commencing July 1st, 1918, and ending March 1st, 1919.

5. Stock Certificate book of Silverthorne Lumber Co. Inc.

6. Stock book of Silverthorne Lumber Co. Inc.

7. Minute book of Silverthorne Lumber Co. Inc. for period commencing Jan. 1, 1918, to March 1, 1919;

in regard to an alleged violation of the Statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne.

140 And, for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

Witness, the Hon. John R. Hazel, Judge of the United States District Court, at the City of Buffalo, in the said Western District of New York, on the 19th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

141 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses be- laid aside you appear before the Grand Inquest of the Body of the People of the United States of America for the Western District of New York, at a District Court to be held in the United States Court House and Post Office Building, in the City of Buffalo, on the 24th day of March, 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Tally books showing tally of shipments of lumber by Silverthorne Lumber Co. Inc. to Shingle Mills Selling Co. and United States Railroad Administration operating the Lehigh Valley Railroad, Erie Railroad, New York Central Railroad, Philadelphia and Reading Railroad, Delaware, Lackawanna & Western Railroad for the period commencing January 1st, 1918 and ending March 1st, 1919 which tally books are numbered and described as follows:

Tally	Book	No.	1,	Exhibit	No.	63
"	"	"	1,	"	"	83
"	"	"	2,	"	"	59
"	"	"	3,	"	"	68
"	"	"	4,	"	"	17
"	"	"	5,	"	"	66
"	"	"	4,	"	"	60
"	"	"	6,	"	"	72
"	"	"	7,	"	"	18
"	"	"	8,	"	"	21
"	"	"	9,	"	"	20
"	"	"	10,	"	"	67
"	"	"	11,	"	"	71
"	"	"	11,	"	"	76
"	"	"	12,	"	"	27
"	"	"	12,	"	"	77
"	"	"	15,	"	"	5
"	"	"	16,	"	"	6

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Tally	Book	No.	17,	Exhibit	No.	7
"	"	"	20,	"	"	4
"	"	"	26,	"	"	28
"	"	"	10,	"	"	69
"	"	"	36,	"	"	29
"	"	"	10,	"	"	70
"	"	"	36,	"	"	74
"	"	"	39,	"	"	57
"	"	"	36,	"	"	73
"	"	"	6,	"	"	64
"	"	"	37,	"	"	75
"	"	"	7,	"	"	26
"	"	"	50,	"	"	61
"	"	"	24,	"	"	62
"	"	"	19,	"	"	9
"	"	"	3,	"	"	19
"	"	"	27,	"	"	16
"	"	"	61,	"	"	56
"	"	"	18,	"	"	8;

in regard to an alleged violation of the Statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne.

And for failure to produce the aforesaid documents you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

Witness, the Honorable John R. Hazel, Judge of the United States District Court at the City of Buffalo, on 19th day of March 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

143 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear before the Grand Inquest of the Body of the People of the United States of America, for the Western District of New York, at a District Court, to be held in the United States Court House and Post Office Building, in the City of Buffalo, on the 24th day of March, 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

L. 1. Cancelled check vouchers of account of Silverthorne Lumber Company, Inc., with Frederick K. Robertson & Company, Bankers, North Tonawanda, N. Y. for period commencing January 1, 1918, and ending March 1, 1919.

2. Inspection reports of cars of lumber shipped by Silverthorne Lumber Company, Inc. as follows: On car No. 3665, initialed P. & K. dated Jan. 11, 1919; on car No. 335943 initialed Sou; on car No. 32054, initialed Sou. dated 10, 18, 18. on car No. 234129, initialed N. Y. C. dated 10/18/18; and on all cars of lumber shipped between Jan. 1, 1918, and March 1, 1919.

3. Bills of lading and Copies of Bills of Lading for shipments of lumber to and by Silverthorne Lumber Company, Inc. for period commencing Jan. 1st, 1918, and ending March 1st, 1919;

in regard to an alleged violation of the statutes of the United States by Asa K. Silverthorne, and Frederick W. Silverthorne.

144 And, for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

Witness, the Hon. John R. Hazel, Judge of the United States District Court, at the City of Buffalo, in the said Western District of New York, on the 19th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

145 The President of the United States of America to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y., Greeting:

We command you, That all business and excuses being laid aside you appear before the Grand Inquest of the Body of the People of

the United States of America for the Western District of New York at a District Court to be held in the United States Court House and Post Office Building, of the City of Buffalo, on the 24th day of March 1919, at ten o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Order cards of shipments of lumber by Silverthorne Lumber Co., Inc., to Shingle Mills Selling Co., and United States Railroad Administration operating the Lehigh Valley Railroad, Erie Railroad, New York Central Railroad, Philadelphia and Reading Railroad and Delaware, Lackawanna and Western Railroad, for the period commencing January 1st, 1918 and ending March 1st, 1919, which cards are recorded and numbered as follows:

Record No.	108,	customer's order	32961	
"	" 244	"	"	G. P. 3146
"	" 144	"	"	1370-Y
"	" 179	"	"	3374-L
"	" 56	"	"	7944, endorsed Thos. E. Coal Lumber Co. with 6 cars attached.
"	" 275	"	"	3377
"	" 271	"	"	19
"	" 220	"	"	9625 marked Thos. E. Coal Lumber Co.
"	" 264	"	"	12
"	" 261	"	52697	
"	" 241	"	44417	
"	" 237	"	44419	
"	" 236	"	44428,	With extra card attached.
"	" 234	"	44401	
"	" 232	"	44402	
"	" 231	"	42183	

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Record No.	227,	Customer's	39593	
"	" 191	"	33325	
"	" 193	"	.....	marked Erie R. R. Co. care C. D. Dearworth, Huntington, Indiana.
"	" 190	"	33313	
"	" 188	"	33300	
"	" 163	"	26787	
"	" 124	"	20945	with sheet attached.
"	" 122	"	20932	
"	" 105	"	15043	
"	" 50	"	6484	
"	" 11	"	56720	
"	" 3	"	218	
"	" 181	"	1751	marked Shingle Mills Selling Co. with three cards attached.

in regard to an alleged violation of the statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne.

And for a failure to produce the aforesaid documents you will be deemed guilty of a contempt of court and liable to the penalties of the law.

Witness, the Honorable John R. Hazel, Judge of the United States District Court at the City of Buffalo, on the 19th day of March, 1919.

[Seal of the Court.]

S. W. PETRIE, *Clerk.*

STEPHEN T. LOCKWOOD,
United States Attorney.

147 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against Asa K. Silverthorne and Frederick W. Silverthorne.

The petitioner, Silverthorne Lumber Company, Inc., having filed its petition, duly verified on the 22nd day of March, 1919, wherefrom it satisfactorily appears that six subpœnas duces tecum have been issued for service upon the petitioner, and that service upon it has been attempted to be made by service upon Henry W. Killeen, one of its attorneys, and that said subpœnas purport to require the petitioner to produce all of its books, papers and documents before this court at ten o'clock in the forenoon of the 24th day of March, 1919, and that said subpœnas, or some of them, may be invalid, by reason of the matters and things set forth in the petition; and,

Upon motion of Penney, Killeen & Nye, attorneys for petitioner, it is

Ordered, that Stephen T. Lockwood, United States District
148 Attorney for the Western District of New York, show cause at a term of this court appointed to be held on the 24th day of March, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said six subpœnas duces tecum should not be vacated and set aside, and the petitioner excused from complying with the same, or with any of them, and why the petitioner should not have such other and further relief as may be proper in the premises; and it is further

Ordered, that until after the hearing and determination of this rule to show cause, the petitioner, and its officers, and other persons on its behalf, are excused from complying with the said six subpœnas duces tecum.

Service of this rule upon Stephen T. Lockwood, United States District Attorney for the Western District of New York, by delivering

a copy thereof to him on or before 12 o'clock *in the* noon of the 22nd day of March, 1919, shall be sufficient.

JOHN R. HAZEL,
United States District Judge.

Dated March 22, 1919.

149 United States District Court, Western District of New York.

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before This Court and the Grand Jury Thereof against Asa K. Silverthorne and Frederick W. Silverthorne.

The petition of Silverthorne Lumber Company, Inc. respectfully shows:

1. Your petitioner is a corporation organized under the Laws of the State of New York, engaged in the lumber business at North Tonawanda, New York, and has been such corporation so engaged for several years last past. That Frederick W. Silverthorne is your petitioner's President and Asa K. Silverthorne is its General Manager. That Mattie F. Silverthorne, wife of said Asa K. Silverthorne and mother of said Frederick W. Silverthorne, owns 1047 shares of the capital stock of your petitioner; Frederick W. Silverthorne owns 205 shares of said stock, and C. N. Richard of Cleveland, Ohio, a son-in-law of said Asa K. Silverthorne and Mattie F. Silverthorne, owns 49 shares of said stock. That Walter H. Tobey, the bookkeeper of your petitioner, owns eight shares of its said stock and Anthony W. Brick, one of this petitioner's salesmen, owns two shares of its capital stock. That your petitioner's authorized capital stock is 1500 shares of the par value of $100.00 each, all common
150 stock, and of the same $131,100 has been issued and is outstanding. That said Mattie F. Silverthorne, her son and son-in-law, as aforesaid, own all of the said issued and outstanding capital stock, except the ten shares thereof owned and held by Walter H. Tobey and Anthony W. Brick, employees of the petitioner, as aforesaid.

2. On or about February 25th, 1919, Frederick W. Silverthorne, the President of your petitioner, and Asa K. Silverthorne, the General Manager of your petitioner, were arrested upon a charge of violation of Section 37 of the Penal Laws, and on the same day were taken before a United States Commissioner, where they gave bail and demanded a hearing; and on the same day, and at the same time, or about the same time as the time of the arraignment aforesaid, Deputy United States Marshals, and others, invaded the office of your petitioner, and, pretending to act by the authority, or under the color of a subpœna *duces tecum*, unlawfully searched the premises of your petitioner, seized its books, papers and documents, and took and carried the same away; thereafter your petitioner commenced a proceeding for the return of its books, papers and documents, and said Asa K. Silverthorne at the same time commenced a proceeding

for the return of the books, papers and documents belonging to him, which were also unlawfully seized and carried away, and that said proceedings resulted in orders directing the return of all of such books, papers and documents, which orders were granted and
151 entered on or about March 5th and 6th, 1919, respectively, all of which more fully appears by the papers and proceedings in said proceeding entitled United States District Court, Western District of New York, in the matter of the petition of Silverthorne Lumber Company, Inc. for an order directed to Stephen T. Lockwood as United States District Attorney, for the Western District of New York, et al., the rule to show cause therein granted on the 28th day of February, 1919, your petitioner's petition verified on the 27th day of February, 1919, and the affidavits of Asa K. Silverthorne and Frederick W. Silverthorne, both sworn to on the same day, and affidavits of Walter H. Tobey and Henry W. Killeen, both sworn to on the 28th day of February, 1919, and the return of the United States District Attorney, Stephen T. Lockwood, containing his affidavit and the affidavits of Thomas E. Moran, William F. Watter, Anthony W. Brick and John S. Monroe, all sworn to on the 1st day of March, 1919, and the affidavit of Julius Schwert, as foreman of the Grand Jury, sworn to on the 3rd day of March, 1919, and the order of this Court entered herein on the 6th day of March, 1919; and also all the papers and proceedings had in the proceeding in this Court entitled United States District Court, Western District of New York, in the matter of the petition of Asa K. Silverthorne for an order directed to Stephen T. Lockwood as United States District Attorney for the Western District of New York, et al., consisting of the said rule to show cause granted on the 28th day of February, 1919, and the affidavits of Walter H. Tobey and Henry W.
152 Killeen, both sworn to on the 28th day of February, 1919, and the order of this Court entered in said proceeding on the 4th day of March, 1919; and also all the papers and proceedings had in another proceeding entitled United States District Court, Western District of New York, in the matter of the petition of Stephen T. Lockwood, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court, etc., certain books, papers, documents and property of the Silverthorne Lumber Company, a corporation, consisting of the petition of said Stephen T. Lockwood, verified and filed with the Clerk of this Court on or about the 4th day of March, 1919, and the return thereto of the Silverthorne Lumber Company, Inc., verified on the 5th day of March, 1919, and the affidavits of Frederick W. Silverthorne and Asa K. Silverthorne and Walter H. Tobey, all sworn to on the 5th day of March, 1919, and the order of this court entered herein denying said motion, to all of which papers your petitioner begs leave to refer, with the same force and effect as though the same were set out herein in full.

3. Thereupon the United States District Attorney returned part, but not all, of the papers, books and documents so unlawfully seized and taken, and many of the books, papers and documents so theretofore unlawfully seized and taken, have not been returned, but

are withheld, and your petitioner is about to take steps to compel compliance with the order aforesaid and to secure a return
153 of all of said books, papers and documents belonging to your petitioner, and the said Asa K. Silverthorne is about to do likewise in his own behalf.

4. On the 8th day of March, 1919, at about or after two o'clock in the afternoon, several subpœnas directed to your petitioner, were delivered to and served upon one Walter H. Tobey, and that said subpœnas directed your petitioner to appear and attend before the Judge of the District Court of the United States of America, for the Western District of New York, at a District Court to be held at the United States Court House, situated in the Post Office Building at Buffalo, New York, on the 11th day of March, 1919, at ten o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the Statutes of the United States by John Doe, and to bring with it and then and there produce, certain papers described in the six subpœnas duces tecum, which include all of the petitioner's books, papers and documents returned to Henry W. Killeen, Esq., attorney and counselor for the petitioner and Asa K. Silverthorne, by Stephen T. Lockwood, United States District Attorney, and John D. Lynn, United States Marshal, both for the Western District of New York, pursuant to the two aforementioned orders; that said six subpœnas served upon your petitioner are ready to be produced as this Court may direct.

5. That thereupon and on the 11th day of March, 1919, your petitioner instituted a proceeding entitled United States District
154 Court, Western District of New York, in the matter of the application of the Silverthorne Lumber Company, Inc., to quash certain subpœnas duces tecum, etc., and obtained from this Honorable Court a rule directed to the United States District Attorney to show cause why said subpœnas duces tecum should not be quashed, which said rule was returnable before this Court, to be held at the Federal Building, in the City of Buffalo, Erie County, New York, on the 18th day of March, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard; that the said rule to show cause was duly heard and the United States District Attorney filed the affidavit of Carl B. Sherman, sworn to on the 18th day of March, 1919, and that after hearing the said rule the United States District Attorney withdrew the said subpœnas duces tecum. That your petitioner begs leave to refer to its said petition and affidavits and the affidavit of Carl B. Sherman and the order withdrawing said subpœnas duces tecum in the last mentioned proceeding, with the same force and effect as though the same were set out herein.

6. That, after the service of the said last mentioned subpœnas duces tecum, on the 8th day of March, 1919, and after the obtaining of the said rule to show cause last mentioned to set aside said subpœnas duces tecum, the Grand Jurors of this Court returned an indictment against your petitioner, Frederick W. Silverthorne and Asa K. Silverthorne and others, charging them with having conspired to defraud the United States of America. Your

155 petitioner appeared in answer to said indictment, as did also the said Federick W. Silverthorne and Asa K. Silverthorne, and pleaded not guilty with leave within twenty days to withdraw such plea and to enter any other plea and to take any other steps as by counsel it may be advised, and the said Frederick W. Silverthorne and Asa K. Silverthorne were admitted to bail.

7. Your petitioner further shows that on or about the — day of March, 1919, several subpœnas duces tecum directed to your petitioner, were issued, signed by the clerk of this court and the United States District Attorney, dated March 19, 1919, and directed to your petitioner; that said subpœnas are six in number; that all of them require your petitioner to appear before the Grand Jury on the 24th day of March, 1919, at ten o'clock in the forenoon, and produce books, papers and documents; that said subpoenas are identical in the description of the books, papers and documents required to be produced, with the six subpœnas hereinabove mentioned, which were annulled and set aside by the rule of this court, hereinbefore recited, and that collectively the said subpœnas call for the production of all the books, papers and documents of the petitioner, returned to your petitioner by the United States District Attorney, as hereinbefore set forth; that collectively, said subpœnas call for the production of practically all of the books, papers and documents of your petitioner, as well as a great number of

156 books, papers and documents belong- to the said Asa K. Silverthorne.

That an attempt to serve said subpoenas upon your petitioner has been made by the delivery of copies thereof, and the exhibition of the originals thereof, to Henry W. Killeen, one of the attorneys of your petitioner, and that, undoubtedly, before the time of the return of said subpœnas, they will likewise have been served upon some officer of your petitioner.

That your petitioner will present to this Court herewith the copies of the six subpœnas aforesaid, served upon said Henry W. Killeen, and will have the same ready to be produced on the hearing of the application to be made by your petitioner, as the Court may require or direct.

8. Your petitioner further shows to this Honorable Court that the books, papers and documents required by said six subpœnas duces tecum to be produced, constitute all of the books, papers and documents of the petitioner, which are in its or its attorneys' possession, and also many of the books, papers and documents belonging to Asa K. Silverthorne personally, and that your petitioner will be unable to carry on its business intelligently, to fill its orders, and to generally meet the daily requirements of its current orders for shipping, unless it retains possession of said books, papers and documents.

157 9. Your petitioner further shows to this Honorable Court that Stephen T. Lockwood, United States District Attorney, his assistants, agents and representatives, acquired the knowledge of the books, papers and documents specified in said six subpœnas, duces tecum, illegally, and in violation of your petitioner's con-

stitutional rights and privileges, and particularly in violation of the immunities afforded to your petitioner under the 4th Amendment of the Constitution of the United States, in that the said Stephen T. Lockwood, United States District Attorney, represented by certain United States Marshals, and other persons, after an unreasonable search of your petitioner's premises and offices, seized and carried away on the 25th day of February, 1919, all of its books, papers and documents, and said Stephen T. Lockwood, United States District Attorney, did then and there detain said books, papers and documents and refused to turn the same over to your petitioner, or to the said Asa K. Silverthorne, and did personally, and by assistant United States District Attorney, his agents, servants and representatives, examine the said books, papers and documents, make copies and excerpts therefrom, and generally learn the contents of said books, papers and documents, and did then and there, between the time of the taking of said papers and the 6th day of March, 1919, ascertain all of the information, facts and data set forth in the said six subpœnas duces tecum.

10. And your petitioner charges that the six subpœnas dues tecum, and each of them are colorable, in that said Stephen
158 T. Lockwood, United States District Attorney, has caused to be issued six several subpœnas, each requiring the production of various books, papers and documents, and that all of the six subpœnas require the production of all your petitioner's books, papers and documents which were taken in the said unlawful raid, and which this Honorable Court declared to be an unreasonable search and seizure of your petitioner's books, papers and effects, and that the said United States District Attorney thereby attempted to accomplish by six several subpœnas duces tecum, what could not be accomplished by a single subpœna.

11. That, as aforesaid, the Grand Jurors of this Court have returned an indictment against your petitioner and others for an alleged conspiracy to defraud the United States, all of which more fully appears by the said indictment on file with the Clerk of this Court. That your petitioner's books, papers and documents, unlawfully seized, as aforesaid, were used by the United States District Attorney, while so unlawfully held and detained by him as aforesaid, and were presented to the said Grand Jurors, which found said indictment, and was unlawfully used as evidence before them against your petitioner, all of which more fully apepars by the affidavit of Stephen T. Lockwood, United States District Attorney, sworn to on the 1st day of March, 1919, and the affidavits of other government officials and agents accompanying the same, in a proceeding instituted before this Court by your petitioner for the recovery of its said books,
159 papers and documents, as aforesaid, to which reference is hereby made, said affidavits being on file with the clerk of this Court, and ready to be produced as this Court may direct.

That, upon information and belief, said United State District Attorney intends to use your petitioner's books, papers and documents called for by said six subpœnas to compel your petitioner to be a witness against itself and to incriminate itself; and that the said

United States District Attorney intends to introduce said books before the present Grand Jury of this Court for the purpose of finding further indictments against your petitioner. Your petitioner's information is based upon said affidavits furnished by the said United States District Attorney and his agents and representatives, and statements made by the said United States District Attorney and his assistants to the effect that such books, papers and documents were to be used to incriminate your petitioner and to be introduced in evidence against it.

That your petitioner fears that said books, papers and documents required to be produced before the said Grand Jury by the United States District Attorney may tend to incriminate it, and, therefore, seeks the constitutional privilege and guarantees protecting it from unlawful searches and seizures and protecting it from being compelled to be a witness against itself and now claims said privi-
160 lege against incriminating itself.

12. And your petitioner charges that said six subpœnas duces tecum are illegal and invalid for the following reasons:

(*a*) That said six subpœnas, regarded as a single subpœna, are unreasonable in that they require the production of all your petitioner's books, papers and documents pertaining to its business, which has extended over a period of nearly five years, and that if your petitioner is compelled to comply with said subpœna it will amount to an unreasonable search and seizure, in violation of the 4th Amendment of the Constitution of the United States.

(*b*) That said six subpœnas are illegal, in that they severally require the production of the books, papers and documents belonging personally to Asa K. Silverthorne, its General Manager, who has been indicted with your petitioner and others, as aforesaid.

(*c*) That said subpœna is illegal in that it requires the production of your petitioner's books, papers and documents, which may be used to incriminate it, and, therefore, is in violation of the 5th Amendment of the Constitution of the United States.

(*d*) That said six several subpœnas duces tecum are illegal and invalid, in that they deny to your petitioner due process of
161 law afforded by the Constitution of the United States and the amendments thereof.

(*e*) That said six several subpœnas duces tecum are illegal, in that they deny to your petitioner the equal protection of the laws as guaranteed to it by the Constitution of the United States and the amendments thereof.

(*f*) That said six several subpœnas duces tecum are illegal, in that sufficient time was not allowed to enable the petitioner to properly comply therewith.

(*g*) That said six several subpœnas duces tecum are illegal and invalid, and are unreasonable, in that the United States District Attorney, Stephen T. Lockwood, his agents, assistants and representatives, and John D. Lynn, the United States Marshal, have not complied with the orders granted by this Honorable Court, directing the return to your petitioner and to Asa K. Silverthorne, of the books, papers and documents taken in said unlawful raid.

(*h*) That said six several subpœnas duces tecum are illegal and invalid, in that the knowledge and information of the books, papers and documents therein specified to be produced, was illegally obtained, and used by the United States Government officials, including Stephen T. Lockwood, United States District Attorney, by and after an unreasonable search and seizure of your petitioner's papers and effects on February 25th, 1919.

162 (*i*) That said subpœnas are illegal and unenforcible in that the production of the books, papers and documents required to be produced might incriminate or tend to incriminate your petitioner, and your petitioner, therefore, pleads its privilege from being compelled to be a witness in any proceeding against itself for the purpose of incriminating itself.

Wherefore, your petitioner prays that a rule be directed to Stephen T. Lockwood, United States District Attorney for the Western District of New York, requiring him to show cause before this Honorable Court, why said subpœna- duces tecum should not be set aside and declared of no effect, and your petitioner excused from complying with said subpœna- duces tecum, or any of them, and that your petitioner have such other and further relief as to the Court may seem proper in the premises.

And your petitioner will ever pray, etc.

SILVERTHORNE LUMBER COMPANY, INC.,

(Signed) By FREDERICK W. SILVERTHORNE,
President.

163 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne being duly sworn, says that he is an officer, to-wit, the President of the petitioner, Silverthorne Lumber Company, Inc., in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) FREDERICK W. SILVERTHORNE.

Sworn to before me this 22nd day of March, 1919.

M. W. WOOD,
Commissioner of Deeds, Buffalo, N. Y.

164 At a Term of the United States District Court Held at the Federal Building, in the City of Buffalo, Erie County, Western District of New York, on the 25th Day of March, 1919.

Present: Hon. John R. Hazel, United States District Judge, Presiding.

UNITED STATES DISTRICT COURT,
Western District of New York:

In the Matter of the Application of SILVERTHORNE LUMBER COMPANY, INC., to Quash Certain Subpœnas Issued to said Company in a Certain Proceeding Pending Before this Court and the Grand Jury Thereof against Asa K. Silverthorne and Frederick W. Silverthorne.

A rule having heretofore been granted by Hon. John R. Hazel, United States District Judge, on the 22nd day of March, 1919, directing Stephen T. Lockwood, United States Attorney, to show cause at a term of this Court, appointed to be held on the 24th day of March, 1919, at ten o'clock in the forenoon, why the six subpœnas duces tecum directed to the Silverthorne Lumber Company, Inc., to produce certain books, papers and documents before the Grand Jury of this Court, on the 24th day of March, 1919, should not be vacated and set aside, and the petitioner above named excused from
165 complying with the same; and said rule to show cause having excused the petitioner from complying with said six subpœnas duces tecum until the determination of said rule to show cause, and on the 25th day of March, 1919, at ten o'clock, in the forenoon, the petitioner having appeared in this Court, by Henry W. Killeen and James O. Moore, his counsel, and the respondent having appeared by Carl Sherman, Assistant United States Attorney, and after due deliberation thereon, it is hereby—

Ordered, that said rule to show cause be, and the same is hereby in all respects denied; it is further

Ordered, that the stay provided for in said rule to show cause be, and the same is hereby vacated, and the petitioner, Silverthorne Lumber Company, Inc., is directed to comply with the said six subpœnas duces tecum, and to produce the books and papers described therein, before the Grand Jury of this Court, at the Federal Building, in the City of Buffalo, New York, on the 26th day of March, 1919, at ten o'clock in the forenoon.

(Signed) JOHN R. HAZEL,
United States Attorney.

166 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

Upon filing the annexed petition of Stephen T. Lockwood, Esq., verified the 28th day of March, 1919, whereupon it appears that the above named Silverthorne Lumber Company, Inc., Henry W. Killeen and Frederick W. Silverthorne have failed to comply with six subpœnas duces tecum heretofore duly served and with the order of this court directing compliance with said subpœnas and that books and papers mentioned in said subpœnas are now in the possession, custody and control of Henry W. Killeen and Frederick W. Silverthorne, now.

Upon motion of Stephen T. Lockwood, Esq., United States Attorney for the Western District of New York, it is hereby;

Ordered, that the Silverthorne Lumber Company, Inc., Henry W. Killeen and Frederick W. Silverthorne comply with the six subpœnas duces tecum heretofore served which subpœnas were
167 originally returnable on March 24th, 1919, by producing the books and papers described in the said subpœnas before the Grand Jury of this Court at the Federal Building, in the City of Buffalo, Western District of New York, on the 1st day of April, 1919 at ten o'clock in the forenoon, and it is further

Ordered that in the event that the said Silverthorne Lumber Company, Inc., Henry W. Killeen and Frederick W. Silverthorne do not so comply with said subpœnas duces tecum that the said Silverthorne Lumber Company, Inc., and the said Henry W. Killeen individually and as attorney for said Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, individually and as president of said Silverthorne Lumber Company, Inc., show cause at a term of this court appointed to be held at the Federal Building, Buffalo, New York, on the 1st day of April 1919, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the said Silverthorne Lumber Company, Inc., Henry W. Killeen and Frederick W. Silverthorne should not be adjudged guilty of contempt of this Court for their failure to so comply with the said subpœnas duces tecum and punished therefore as this Court may deem proper.

(Signed) JOHN R. HAZEL,
United States District Judge.

168 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

The petition of Stephen T. Lockwood, United States Attorney for the Western District of New York, respectfully shows:

That your petitioner is the United States Attorney for the Western District of New York, and that the Grand Jury is now regularly in session for the term of this Court commencing March 11, 1919. That the petitioner intended to present to said Grand Jury evidence with reference to an alleged conspiracy on the part of one Asa K. Silverthorne and one Frederick W. Silverthorne to defraud the United States of America. That upon application duly made, this Court ordered the clerk thereof to issue six (6) subpœnas duces tecum directed to the above named Silverthorne Lumber Company, Inc., to produce said books and papers mentioned in said six (6) subpœnas duces tecum. That said six (6) subpœnas duces tecum are on file with the clerk of this Court together with due proof and re-
169 turn of service thereof upon the above named Henry W. Killeen and the above named Frederick W. Silverthorne. Your petitioner begs to refer to said original of subpœnas duces tecum and to the Marshal's return thereon for further particularity with reference thereto.

That said Silverthorne Lumber Company, Inc., is a domestic corporation having its principal place of business in the city of North Tonawanda, Western District of New York. And Frederick W. Silverthorne above named is the president thereof, that Henry W. Killeen is its attorney. That the several books and papers mentioned in said six (6) subpœnas are and at all times herein mentioned were in the possession, custody and control of the said Henry W. Killeen as attorney for said Silverthorne Lumber Company, Inc., and of said Frederick W. Silverthorne as president of the said Silverthorne Lumber Company, Inc. That each of the said six (6) subpœnas duces tecum were duly personally served on the said Frederick W. Silverthorne on the 22nd day of March, 1919, and on said Henry W. Killeen on the 21st day of March, 1919, as appears in the said United States Marshal's return, and that each of said subpœnas were returnable on the 24th day of March, 1919, and commanding production of the books and papers mentioned therein before the aforesaid Grand Jury on the said 24th day of March 1919.

That thereafter said Silverthorne Lumber Company, Inc., presented its petition verified the 22nd day of March 1919 to this Court, upon which petition this Court made a rule to show cause on March

22nd, 1919, which petition and rule are hereby referred to
170 and made a part hereof, ordering your petitioner Stephen T. Lockwood, United States Attorney to show cause on March 24, 1919, why said six (6) subpœnas duces tecum should not be set aside and ordering that said Silverthorne Lumber Company, Inc., and its officers and other persons on its behalf be excused from complying with said six (6) subpœnas duces tecum until the determination of said rule to show cause.

That said rule to show cause came on for argument before this Court on the 25th day of March, 1919. This Court made an order denying said rule to show cause and vacating the stay therein excusing said Silverthorne Lumber Company, Inc. and its officers from complying with said six (6) subpœnas duces tecum and directing said Silverthorne Lumber Company Inc. and the said Henry W. Killeen and the said Frederick W. Silverthorne to produce said books and papers mentioned in said six (6) subpœnas duces tecum before the Grand Jury of this Court at the Federal Building, Buffalo, New York on the 26th day of March, 1919, at ten o'clock in the forenoon. A copy of said order was duly served upon James O. Moore, counsel for said Silverthorne Lumber Company, Inc. at about ten o'clock a. m., on said 26th day of March, 1919.

That the said Silverthorne Lumber Company, Inc., and Henry W. Killeen and the said Frederick W. Silverthorne did not comply with the said six (6) subpœnas duces tecum nor any of them and the said Silverthorne Lumber Company Inc., Henry W. Killeen and Frederick W. Silverthorne did not comply with the said order
171 of the Court dated the 26th day of March, 1919, in any manner whatsoever, and that the said Henry W. Killeen, Frederick W. Silverthorne, and Silverthorne Lumber Company did not appear before the said Grand Jury on the 26th day of March, 1919, or at any other time and did not produce any of the books, any of the papers mentioned in any of the said six (6) subpœnas duces tecum on the said 26th day of March, 1919, or at any other time whatsoever. That your petitioner is informed by Carl Sherman, his assistant, that said Henry W. Killeen has informed said Sherman that the said Silverthorne Lumber Company, Inc., Frederick W. Silverthorne, Henry W. Killeen will not comply with the said six (6) subpœnas duces tecum or any of them or with the order of the Court, dated March 26, 1919, and that said Henry W. Killeen has informed this Court to the same effect that the Silverthorne Lumber Company and Frederick W. Silverthorne intend to be in contempt of this Court, and to review the right of the Grand Jury to inspect the books and papers of the Silverthorne Lumber Company, Inc., upon an appeal from an order committing said Silverthorne Lumber Company, Inc., Henry W. Killeen and Frederick W. Silverthorne for contempt of court.

That said order of this Court, dated March 26, 1919 was not personally served upon Henry W. Killeen or upon Frederick W. Silverthorne, said Henry W. Killeen having been out of the city on March 26, 1919, and the United States Marshal having not been able to find Frederick W. Silverthorne on March 26, 1919.

Wherefore your petitioner prays for a rule directing said
172 Silverthorne Lumber Company, Inc., Frederick W. Silverthorne and Henry W. Killeen to comply with said six (6) subpœnas duces tecum by producing the books and papers therein mentioned before the Grand Jury of this Court at the Federal Building, Buffalo, New York on the 1st day of April, 1919 at 10 o'clock in the forenoon and in the event that said subpœnas duces tecum are not so complied with to show cause before this Court on April 1st, 1919 why the said Silverthorne Lumber Company, Inc. and the said Frederick W. Silverthorne individually and as president of said Silverthorne Lumber Company, Inc. and the said Henry W. Killeen, individually and as attorney for said Silverthorne Lumber Company, Inc., should not be adjudged guilty of contempt of this court for failure so to do, and be punished and sentenced therefor, as to this Court may deem proper.

And your petitioner will ever pray, etc.

(Signed) STEPHEN T. LOCKWOOD,
Attorney of the United States in and for the Western District of New York.

173 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Stephen T. Lockwood, Attorney of the United States, in and for the Western District of New York, being duly sworn deposes and says that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) STEPHEN T. LOCKWOOD.

Sworn to before me this 28th day of March, 1919.

(Signed) FRANCIS E. KERWIN.
Notary Public in and for Erie County, New York.

174 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen Individually and as Attorney of the Silverthorne Lumber Company, Inc.

Now comes the defendant Silverthorne Lumber Company, Inc., and makes this its answer to the petition of Stephen T. Lockwood, United States District Attorney for the Western District of New York.

First. It denies, upon information and belief, that said six subpœnas duces tecum in the petition mentioned, or any of them, were

duly personally served on Frederick W. Silverthorne on March 22nd, 1919, or at any other time.

Second. It denies that on the 25th day of March, 1919, or at any other time, the Honorable United States District Court for the Western District of New York made an order directing Henry W. Killeen and Frederick W. Silverthorne to produce the said books, and papers, mentioned in the said six several subpœnas duces tecum,
before the Grand Jury of this Court, at the Federal Building,
175 in the City of Buffalo, New York, at ten o'clock in the forenoon, or at any other time.

Third. It denies that the said alleged order in the petition mentioned was duly served upon James O. Moore, counsel for the defendant Silverthorne Lumber Company, Inc., at about ten o'clock in the forenoon, on the said 26th day of March, 1919, and alleges that said order was served upon James O. Moore not earlier than eleven o'clock in the forenoon of the 26th day of March, 1919.

II.

For a second answer and further defense the defendant, Silverthorne Lumber Company, Inc., alleges:

First. That it is a corporation organized under the Laws of the State of New York, engaged in the lumber business at North Tonawanda, New York, and has been such corporation so engaged for several years last past. That Frederick W. Silverthorne is its President and Asa K. Silverthorne is its General Manager. That Mattie F. Silverthorne, wife of said Asa K. Silverthorne and mother of said Frederick W. Silverthorne, owns 1047 shares of its capital stock; Frederick W. Silverthorne owns 205 shares of said stock, and C. N. Richard of Cleveland, Ohio, a son-in-law of said Asa K. Silverthorne and Mattie F. Silverthorne has in his name upon the books of defendant 49 shares of said stock; and that Walter H. Tobey, its bookkeeper, has in his name upon the books of defendant eight
176 shares of its said stock and Anthony W. Brick, one of its salesmen, has in his name upon the books of defendant two shares of its capital stock, but that said Mattie F. Silverthorne is the real owner of the said stock so as aforesaid standing in the names of the said C. N. Richard, Walter H. Tobey and Anthony W. Brick, in addition to the 1047 shares above mentioned. That its authorized capital stock is 1500 shares of the par value of $100.00 each, all common stock, and of the same 1311 shares have been issued and are outstanding.

Second. That on or about February 25th, 1919, Frederick W. Silverthorne, the President of defendant, and Asa K. Silverthorne, its General Manager, were arrested by United States Marshals upon a charge of violating Section 37 of the Penal Laws, and on the same day were taken before a United States Commissioner, where they gave bail and demanded a hearing; and on the same day, and at the same time, or about the same time as the time of the arraignment aforesaid, Deputy United States Marshals, and others, invaded the office of defendant, and, pretending to act by the authority or

under the color of a subpœna duces tecum, unlawfully searched and conducted an unreasonable search of the defendant's premises, seized its books, papers and documents, and also the personal and private books, papers and documents of said Asa K. Silverthorne, and took and carried the same away. That thereafter defendant commenced a proceeding in this Honorable Court for the
177 return of its books, papers and documents, and said Asa K. Silverthorne at the same time commenced a proceeding for the return of the books, papers and documents belonging to him, which were also at the same time unlawfully seized and carried away, and that said proceedings resulted in orders being granted by this Honorable Court directing the return of all of such books, papers and documents, which orders were granted and entered on or about March 5th, and 6th, 1919, respectively, all of which more fully appears by the papers and proceedings in said proceeding entitled "United States District Court, Western District of New York, in the matter of the petition of Silverthorne Lumber Company, Inc., for an order directed to Stephen T. Lockwood as United States District Attorney for the Western District of New York, et al.," the rule to show cause therein granted on the 28th day of February, 1919, defendant's petition, verified on the 27th day of February, 1919, and the affidavits of Asa K. Silverthorne and Frederick W. Silverthorne, both sworn to on the same day, the affidavits of Walter H. Tobey and Henry W. Killeen, both sworn to on the 28th day of February, 1919, and the return of the United States District Attorney, Stephen T. Lockwood, containing his affidavit and the affidavits of Thomas E. Moran, William F. Watter, Anthony W. Brick and John S. Monroe, all sworn to on the 1st day of March, 1919, and the affidavit of Julius Schwert, as foreman of the Grand Jury, sworn to on the 3rd day of March, 1919, and the affidavit of Anthony W. Brick, sworn to on the — day of March, 1919, and the order of this Court entered in the Clerk's office on the 6th day of
178 March, 1919; and also all the papers and proceedings had in the proceeding in this Court entitled "United States District Court, Western District of New York, in the matter of the petition of Asa K. Silverthorne for an order directed to Stephen T. Lockwood as United States District Attorney for the Western District of New York, et al." consisting of the said rule to show cause granted on the 28th day of February, 1919, and the affidavits of Walter H. Tobey and Henry W. Killeen, both sworn to on the 28th day of February, 1919, and the order of this Court entered in said proceeding on the 4th day of March, 1919; and also all the papers and proceedings had in another proceeding entitled "United States District Court, Western District of New York, in the matter of the petition of Stephen T. Lockwood, Attorney of the United States in and for the Western District of New York, for an order impounding to the custody of the Clerk of the United States District Court, etc., certain books, papers, documents and property of the Silverthorne Lumber Company, Inc., a corporation," consisting of the petition of said Stephen T. Lockwood, verified and filed with the Clerk of this Court on or about the 4th day of March, 1919, and the return

thereto of the Silverthorne Lumber Company, Inc., verified on the 5th day of March, 1919, and the affidavits of Frederick W. Silverthorne and Asa K. Silverthorne and Walter H. Tobey, all sworn to on the 5th day of March, 1919, and the order of this Court entered herein denying said motion, to all of which papers reference is hereby made with the same force and effect as though the
179 same were set out herein in full.

Third. That thereupon the United States District Attorney returned part, but not all of the books, papers and documents so unlawfully seized and taken, and many of the books, papers and documents so theretofore unlawfully seized and taken, have not been returned, but are withheld, and defendant is desirous that said Stephen T. Lockwood be compelled to comply with the order aforesaid and to return all of said books, papers and documents belonging to defendant.

Fourth. That on the 8th day of March, 1919, at about or after two o'clock in the afternoon, several subpœnas duces tecum directed to defendant, were delivered and served upon one Walter H. Tobey, and that said subpœnas duces tecum direct defendant to appear and attend before the Judge of the District Court of the United States of America, for the Western District of New York, at a District Court to be held at the United States Court House situated in the Post Office building at Buffalo, New York, on the 11th day of March, 1919, at ten o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe, and to bring with it and then and there produce, certain papers described in the six subpœnas duces tecum, which include all of the defendant's books, papers and documents returned to Henry W. Killeen, Esq., attorney and counsel for the defendant and Asa K. Silverthorne, by Stephen T. Lockwood, United States District Attorney, and John D. Lynn,
180 United States Marshal, both for the Western District of New York, pursuant to the two aforementioned orders; that said six subpœnas duces tecum served upon defendant are ready to be produced as this Court may direct.

Fifth. That thereupon and on the 11th day of March, 1919, defendant instituted a proceeding entitled "United States District Court, Western District of New York, in the Matter of the Application of the Silverthorne Lumber Company, Inc., to quash said six subpœnas duces tecum, etc.," and obtained from this Honorable Court a rule directed to the United States District Attorney to show cause why said subpœnas duces tecum should not be quashed, which said rule was returnable before this Court, to be held at the Federal Building, in the City of Buffalo, Erie County, New York, on the 18th day of March, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard; that the said rule to show cause was duly heard and the United States District Attorney filed the affidavit of Carl B. Sherman, sworn to on the 18th day of March, 1919, and that after hearing upon the said rule the United States District Attorney withdrew the said subpœnas duces tecum. That defendant begs leave to refer to its said petition and affidavits and

the affidavit of Carl B. Sherman and the order withdrawing said subpœnas duces tecum in the last mentioned proceeding, with the same force and effect as though the same were set out herein.

Sixth. That, after the service of the said last mentioned
181 subpœnas duces tecum, on the 8th day of March, 1919, and after the obtaining of the said rule to show cause last mentioned to set aside said subpœnas duces tecum, the Grand Jurors of this Court returned an indictment against defendant, Frederick W. Silverthorne and Asa K. Silverthorne and others, charging them with having conspired to defraud the United States of America. Defendant appeared in answer to said indictment, as did also the said Frederick W. Silverthorne and Asa K. Silverthorne, and pleaded not guilty with leave within twenty days to withdraw such plea and to enter any other plea and to take any other steps as by counsel it may be advised, and the said Frederick W. Silverthorne and Asa K. Silverthorne were admitted to bail.

Seventh. Defendant alleges that thereafter and on or about the 21st day of March, 1919, six several subpœnas duces tecum directed to your petitioner were issued, signed by the Clerk of this Court and the United States District Attorney, dated March 19th, 1919; that all of them required defendant to appear before the Grand Jury on the 24th day of March, 1919, at ten o'clock in the forenoon, and produce books, papers and documents; that said subpœnas are identical in the description of the books, papers and documents required to be produced, with the six subpœnas hereinabove mentioned, which were annu-led and set aside by the rule of this court, hereinbefore cited, and that collectively the said subpœnas call for the production of all the books, papers and documents of
182 the petitioner, returned to your petitioner by the United States District Attorney, as hereinbefore set forth; that collectively, said subpœnas call for the production of practically all of the books, papers and documents of defendant, as well as a great number of books, papers and documents belonging to the said Asa K. Silverthorne; and that many of the books, papers and documents, which defendant was required to produce, are not in its possession, but are in the possession of the said Stephen T. Lockwood, said United States District Attorney, his agents, representatives and servants, and other officers of the United States and are wrongfully detained by such officials.

That the books, papers and documents, which personally belong to Asa K. Silverthorne and which are his private books, papers and documents and required to be produced by said six subpœnas duces tecum, *and* set out in Schedule "A" hereto attached, and that said books, papers and documents were returned to said Asa K. Silverthorne by the United States District Attorney, and his representatives, as aforesaid, and the same are not in the possession or under the control of defendant and never have been.

Eighth. Defendant alleges that Stephen T. Lockwood, United States District Attorney, his assistants, agents and representatives, acquired the knowledge of the books, papers and documents specified in said six subpœnas duces tecum, illegally, and in violation of

defendant's constitutional rights and privileges, and partic-
183 ularly in violation of the immunities afforded to defendant under the 4th Amendment to the Constitution of the United States, in that the said Stephen T. Lockwood, United States District Attorney, represented by certain United States Marshal, and other persons, after an unreasonable search of the defendant's premises and offices, seized and carried away on the 25th day of February, 1919, all of its books, papers and documents, as aforesaid, and said Stephen T. Lockwood, United States District Attorney, did then and there detain said books, papers and documents and refused to turn the same over to defendant, or to the said Asa K. Silverthorne, and did personally, and by assistant United States District Attorneys, his agents, servants and representatives, examine the said books, papers and documents, make copies and excerpts therefrom, and generally learn the contents of said books, papers and documents, and did then and there, between the time of the taking of said papers and the 6th day of March, 1919, ascertain all of the information, facts and data set forth in the said six subpœnas duces tecum.

Ninth. And defendant alleges that the six subpœnas duces tecum, and each of them, are colorable, in that said Stephen T. Lockwood, United States District Attorney, has caused to be issued six several subpœnas, each requiring the production of various books, papers and documents, and that all of the six subpœnas, collectively and regarded as a single subpœna, require the production of all your de-
fendant's books, papers and documents, which were taken in
184 the said unlawful raid, and which this Honorable Court declared to be an unreasonable search and seizure of defendant's books, papers and effects, and that the said United States District Attorney thereby attempted to accomplish by six several subpœnas duces tecum, what could not be accomplished by a single subpœna.

Tenth. That, as aforesaid, the Grand Jurors of this Court have returned an indictment against defendant and others for an alleged conspiracy to defraud the United States, all of which more fully appears by the said indictment on file with the Clerk of this Court. That defendant's books, papers and documents, unlawfully seized, as aforesaid, were used by the United States District Attorney, while so unlawfully held and detained by him as aforesaid, and were presented to the said Grand Jurors, which found said indictment, and was unlawfully used as evidence before them against defendant, all of which more fully appears by the affidavit of Stephen T. Lockwood, United States District Attorney, sworn to on the 1st day of March, 1919, and the affidavits of other government officials and agents accompanying the same, in said proceeding instituted before this Court by defendant for the recovery of its said books, papers and documents, as aforesaid, to which reference is hereby made, said affidavits being on file with the Clerk of this Court, and ready to be produced as this Court may direct.

That, upon information and belief, said United States District

Attorney, intends to use defendant's books, papers and documents called for by said six subpœnas to compel defendant to be a witness against itself and to incriminate itself; and that the said United States District Attorney intends to introduce said books before the present Grand Jury of this Court for the purpose of finding further indictments against defendant. That its information is based upon said affidavits furnished by the said United States District Attorney and his agents and representatives, and statements made by the said United States District Attorney and his assistants to the effect that such books, papers and documents were to be used to incriminate defendant and to be introduced in evidence against it.

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That said books, papers and documents required to be produced before the said Grand Jury by the United States District Attorney may tend to incriminate it, and, therefore, defendant seeks the constitutional privileges and guarantees protecting it from the unlawful searches and seizures and protecting it from being compelled to be a witness against itself and now claims said privilege against incriminating itself.

Eleventh. And defendant alleges that said six subpœnas duces tecum are illegal and invalid for the following reasons:

(*a*) That said six several subpœnas duces tecum are illegal and invalid for the reason that all the books, papers and documents sought to be compulsorily produced by the defendant are the same books, papers and documents, which were, as aforesaid, on February 25th, 1919, unlawfully seized after an unreasonable search of the defendant's premises by United States Marshals and representatives of Stephen T. Lockwood, United States District Attorney for the Western District of New York, and other United States agents and officials, and were unlawfully detained by them until on or about the 6th day of March, 1919.

186

(*b*) That said six subpœnas duces tecum, regarded as a single subpœna, are unreasonable in that they require the production of all defendant's books, papers and documents pertaining to its business, which has extended over a period of nearly five years, and that if defendant is compelled to comply with said subpœnas it will amount to an unreasonable search and seizure, in violation of the 4th Amendment to the Constitution of the United States.

(*c*) That said subpœnas duces tecum are illegal, in that they severally require the production of the books, papers and documents belonging personally to Asa K. Silverthorne, its General Manager, who has been indicted with defendant and others, as aforesaid.

(*d*) That said subpœnas duces tecum are illegal in that it requires the production of defendant's books, papers and documents, which may be used to incriminate it, and, therefore, is in violation of the 4th and 5th Amendments to the Constitution of the United States.

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(*e*) That said six several subpœnas duces tecum are illegal and invalid, in that they deny to defendant due process of law afforded by the Constitution of the United States and the amendments thereof.

(*f*) That said six several subpœnas duces tecum are illegal, in that they deny to defendant the equal protection of the laws as guaranteed to it by the Constitution of the United States and the amendments thereof.

(*g*) That said six several subpœnas duces tecum are illegal and invalid, and are unreasonable, in that the United States District Attorney, Stephen T. Lockwood, his agents, assistants and representatives, and John D. Lynn, the United States Marshal, have not complied with the orders granted by this Honorable Court, directing the return to defendant and to Asa K. Silverthorne, of the books, papers and documents taken in said unlawful raid.

(*h*) That said six several subpœnas duces tecum are illegal and invalid, in that the knowledge and information of the books, papers and documents therein specified to be produced, was illegally obtained, and used by the United States Government officials, including Stephen T. Lockwood, United States District Attorney, by and after an unreasonable search and seizure of your petitioner's papers and effects on February 25th, 1919.

188 (*i*) That said subpœnas are illegal and unenforceible in that the production of the books, papers and documents required to be produced might incriminate or tend to incriminate defendant, and it, therefore, pleads its privilege from being compelled to be a witness in any proceeding against itself for the purpose of incriminating itself.

Twelfth. That after the alleged service of the said six subpœnas duces tecum, as aforesaid, this defendant in a proceeding entitled "United States District Court, Western District of New York, in the Matter of the Application of the Silverthorne Lumber Company, Inc. to quash certain subpœnas issued to said company in a certain proceeding pending before this Court and the Grand Jury thereof, against Asa K. Silverthorne and Frederick W. Silverthorne," presented to the United States District Court for the Western District of New York its duly verified petition setting forth the facts and circumstances above mentioned and obtained a rule from the Honorable John R. Hazel, United States District Judge, directed to Stephen T. Lockwood, United States District Attorney for the Western District of New York, to show cause at a Term of the said Court, appointed to be held in the Federal Building, in the City of Buffalo, New York, at ten o'clock in the forenoon, on the 24th day of March, 1919, or as soon thereafter as counsel could be heard, why said six several subpœnas duces tecum should not be vacated and set aside for the reasons in said petition stated and as hereinbefore set forth. Said petition together

189 with the said rule to show cause were duly filed with the Clerk of the United States District Court, and the same are incorporated herein with the same force and effect as though the same were set out herein in full. That said rule to show cause came on to be heard on the 25th day of March, 1919, at ten o'clock in the forenoon, Mr. James O. Moore, of Buffalo, New York, appearing as counsel for this defendant, and Carl W. Sherman, Assistant United States District Attorney, appearing as counsel for the said Stephen T. Lockwood. That after the hearing of the counsel for the respective parties,

the Court on the 26th day of March, 1919, granted an order denying said rule to show cause and directed the defendant to comply with said six subpœnas duces tecum, which said order was filed with the Clerk of this Court on the said 26th day of March, 1919, and a copy of the same was served upon James O. Moore, counsel for the defendant, at about eleven o'clock in the forenoon of that day.

Thirteenth. That the defendant has full and due respect for the United States, its laws and the dignity of its people, and has also full and due respect for the honor and dignity of this Honorable Court and for its orders, judgments and decrees, and that it sincerely and in good faith desires to so conduct itself that none of its acts or omissions may be regarded in fact as contumacious or as an affront to the dignity of this Honorable Court, or to its orders, judgments and decrees;

and being thus well intentioned, as all law*ful* abiding citizens
190 should be, defendant is confronted with the dilemma of complying with the order of the Honorable Court directing it to produce its books, papers and documents, as aforesaid, and thereby loosing and forever abandoning the securities and privileges afforded to it by the Constitution of the United States and subjecting itself to criminal prosecution, or of accepting the charges of guilt of a technical contempt in failing to obey said order; and for the reasons above stated, and for the reasons that the defendant's privilege and security in its books, papers and effects has been unlawfully invaded by the United States officials, and its books, papers and documents unlawfully seized and carried away by the said United States officials, and being deprived of the guarantees and privileges afforded to it by the Constitution of the United States against unreasonable searches and seizures; and for the reasons that the compliance with the said six subpœnas duces tecum, or any of them, would be affording to the said United States officials the fruits of their unlawful acts in searching defendant's premises and seizing and carrying away its books, papers and effects contrary to the Constitution of the United States; and for the reason that the United States officials are about to proceed by virtue of the six subpœnas duces tecum and the compulsory production of defendant's books, papers and documents, to compel it to be a witness against itself in a criminal proceeding and to cause it to

incriminate itself and to deny to it the protection of the Con-
191 stitution of the United States. That the Supreme Court of the United States is the final arbiter for the interpretation of the meaning and for the determination of the application of the Constitution of the United States. That the Supreme Court of the United States upon a proper presentation of the facts and circumstances involved herein will hold and decide, as defendant verily believes, that defendant's privileges and immunities afforded by the 4th Amendment to the Constitution of the United States were unlawfully invaded by the unreasonable search and seizure of its books, papers and effects by the officials of the United States, as hereinbefore set forth, and that the officials of the United States cannot by the said subpœnas duces tecum, or otherwise, secure the benefits and fruits of such unlawful acts, or the facts and information contained in the said books, papers and documents, so as aforesaid unlawfully seized, and that the

said books, papers and documents, so as aforesaid unlawfully seized and now sought to be *compulsory* produced, cannot be used against the defendant in any proceeding by the United States to incriminate the defendant, or otherwise; and that the defendant is entitled to the privileges and immunities of the 4th and 5th Amendments to the Constitution of the United States and is entitled to assert the privileges and immunities of the Constitution of the United States against incriminating itself, and cannot be compelled to produce its books, papers and documents for that purpose; and that it is entitled
192 to the equal protection of the laws.

The defendant has fully and fairly stated the facts and circumstances of this case to James O. Moore, its counsel, residing at No. 778 Potomac Avenue, in the City of Buffalo, New York, and is advised by said counsel, after said statement, that the unlawful seizure of its books, papers and effects by the officials of the United States, as aforesaid, was an unlawful act on the part of the officials of the United States, and that the said Stephen T. Lockwood, United States District Attorney cannot now lawfully compel the defendant to produce said books, papers and documents, so as aforesaid unlawfully seized, to incriminate it, and that it is entitled to the privileges and immunities afforded by the 4th, 5th and 14th Amendments to the Constitution of the United States against unreasonable searches and seizures, against being compelled to be a witness against itself, and to the privilege of equal protection of the laws, and this defendant verily believes.

Wherefore, it is respectfully prayed that said rule to show cause be denied.

THOMAS PENNEY,
HENRY W. KILLEEN,
OLIN T. NYE,
Solicitors and Attorneys for Defendants.

JAMES O. MOORE,
Of Counsel.

193 STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, deposes and says that he is an officer, to wit, President of the defendant Silverthorne Lumber Company, in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except such matters as are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 1st day of April, 1919.

M. W. WOOD,
Commissioner of Deeds, Buffalo, N. Y.

194 SCHEDULE "A."

1 bank book marked "Fred'k Robertson & Co. Bankers North Tonawanda, New York in account with Silverthorne Lumber Co. Inc. Special, covering period from December 28, 1917 to November 1st, 1918, both inclusive; also paid checks of Silverthorne Lumber Company Special account paid through Fred'k Robertson & Company, Bankers, North Tonawanda, numbered and dated as follows,—

No. 5280, Sept. 27, 1918, payable to Cash for $500.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne, President.

No. 5281, Sep. 26, 1918, payable to Silverthorne Lumber Co., Inc., amount $2292.88, signed by Silverthorne Lumber Company, Inc., A. K. Silverthorne President; endorsed on back "Pay to the Order of Fred'k. Robertson & Co., Bankers, North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co. Inc."

No. —, Oct. 14, 1918, payable to Cash amount $9824.31 signed by Silverthorne Lumber Co. Inc. Special A. K. Silverthorne.

No. —, Oct. 15, 1918, payable to Cash, amount $5258.00 signed by Silverthorne Lu Co Inc. A. K. Silverthorne Pres. Spec.

No. 5275 Oct. 18, 1918, payable to Cash, amount $974.89 signed by Silverthorne Lumber Company, Inc. Special A. K. Silverthorne President Spec.

No. —, Oct. 21, 1918, payable to Cash (Dft A. J. Wright & Co.) amount $769.75, signed by Silverthorne Lu Co Inc. Special A. K. Silverthorne Pres.

No. 5272 Oct. 24, 1918, payable to Fred'k Robertson & Co., amount $10,000.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5271 Oct. 25, 1918, payable to order of Dft. for F. J. Shields, amount $1000.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5277 Oct. 5, 1918, payable to Silverthorne Lumber Co., Inc. amount $159.74, signed Silverthorne Lumber Company, Inc. A. K. Silverthorne President; endorsed on back "Pay to the order of Fred'k. Robertson & Co. Bankers North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co. Inc."

195 No. —, Nov. 12, 1918, payable to Cash amount $55.60, signed by Silverthorne Lu Co Inc. A. K. Silverthorne.

No. 5270, November 1, 1918, payable to Cash, amount $200.00 signed by Silverthorne Lumber Company, Inc., A. K. Silverthorne President.

Tally Book No. 1.
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" " " 18.

196 Record of profits and losses on shipments of lumber for a period commencing January 1, 1918 and ending March 1, 1919.

Order cards of shipments of lumber, as follows:
Record No. 56, Customer's order No. 7944, with cards attached.
Record No. 181, Customer's order No. 1751, with cards attached.

197 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

against

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually, and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

UNITED STATES OF AMERICA,
Western District of New York,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, says:

With reference to certain books, papers and documents demanded in the subpœnas referred to in the petition and rule herein, I beg leave to say:

One of the items demanded is as follows:

"Freight bills, letters and copies of letters, invoices and copies of invoices, relating to shipments of lumber received and shipped by Silverthorne Lumber Co., Inc., for the period commencing January 1, 1918 and ending March 1, 1919."

There are some few of these now in the possession of the Company; there were a larger number, or a very considerable number thereof in the office prior to the raid upon the office by the
198 United States marshals and railroad police on February 29, 1919, and apparently the same were carried off in said raid. Only a few thereof have been returned.

Another item mentioned in one of the subpœnas referred to calls for the following:

"Receipts for payments by Silverthorne Lumber Co., Inc., for lumber for period commencing January 1, 1918 and ending March 1, 1919."

There are none of these receipts in the possession of the Company at this time, or at any time since the raid. They must have been taken by the raiding party and they have not been returned.

Another item mentioned in one of the subpœnas, above referred to, is as follows:

"Minute book of Silverthorne Lumber Co., Inc., for period from January 1, 1918 to March 1, 1919."

This book is not in the possession of the Company and has not been returned by the United States District Attorney.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 31st day of March, 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

199 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

And now comes the defendant, Frederick W. Silverthorne, and makes this his answer to the rule and petition in the above entitled cause:

He denies that the said six subpœnas duces tecum, or any of them, were duly personally served on him on the 22nd day of March, 1919, or at any other time, and alleges the fact to be that on or about the 22nd day of March, 1919, a person purporting and representing himself to be a Deputy United States Marshal laid on a desk before this defendant six copies of a purported subpœna duces tecum, and that the said process server did not exhibit to this defendant the originals of said six subpœnas duces tecum, or the original of any of them, and did not state to defendant the contents of said purported six subpœnas duces tecum, or any of them.

200 Wherefore, this defendant prays for an order dismissing the said rule to show cause.

THOMAS PENNEY,
HENRY W. KILLEEN,
OLIN T. NYE,
Solicitors and Attorneys for Defendant.

JAMES O. MOORE,
Of Counsel.

201 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne being duly sworn, deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) FREDERICK W. SILVERTHORNE.

Sworn to before me this 1st day of April, 1919.

(Signed) E. M. KREISS,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

202 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

against

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

UNITED STATES OF AMERICA,
Western District of New York,
County of Erie, City of Buffalo, ss:

Frederick W. Silverthorne, being duly sworn, says:

On the 22nd day of March, 1919, Mr. Killeen telephoned me to come to his office in the morning. I came to the office. Shortly after my arrival, a deputy United States marshal, with whom I am acquainted by sight, but whose name I do not know, was admitted to Mr. Killeen's private office, where Mr. Killeen and I were sitting. He said to me "I am glad to find you, I have spent $3.00 trying to find you." I made some reply. He had in his hand a bundle of papers, all of which were folded. This bundle he then either handed to me or laid on the desk in front of me. There was some more pleasantry about his trouble in finding me and he left the office. He did not tell me that the papers were subpœnas; he did not exhibit to me any original paper or papers; he did not state to me the
203 substance of the papers, or any of them, or the command thereof. After he left the office, I passed the papers to Mr. Killeen. We looked at them and found that there were six papers and that they were addressed to the Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y. Mr. Killeen said to me at that time that I should remember the circumstances of the attempted service. Nothing else was said or done by the deputy marshal than as above recited, with reference to said papers, or with reference to service thereof upon me.

FREDERICK W. SILVERTHORNE.

Sworn to before me this 31st day of March, 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

204 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC., FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

And now comes Henry W. Killeen, one of the respondents in this action or proceeding, and for his return or answer to the rule herein respectfully shows to this honorable court:

1. This respondent respectfully returns and shows that at the time of the delivery to this respondent of the copies of the subpœnas mentioned in the petition, this respondent was not in possession of any of the books, papers and documents, referred to in said subpœnas, and had no lawful right, power or authority to obtain or take possession thereof, or to bring the same before the United States Grand Jury, or elsewhere, pursuant to said subpœnas, or otherwise, and that said books, papers and documents have not since come into his possession, all of which more fully appears in the affidavit of this respondent, hereto attached.

2. And this respondent further shows that upon the de-
205 livery of the said copies of subpœnas to this respondent, this respondent arranged with the deputy United States Marshal, who delivered said copies to this respondent, to produce an officer, to wit, the president of the Silverthorne Lumber Company, Inc., on the following day in order that service of the subpœnas might be made upon the corporation, and this respondent did procure the president of this corporation to attend and be in the office of this respondent on March 22, 1919 to receive service of said subpœnas, and that papers, purporting to be copies of such subpœnas, were then and there delivered to the president of said corporation, pursuant to such arrangement, all of which more fully appears in the affidavit of the respondent, hereto annexed.

3. And this respondent further shows that he never was served with any of the subpœnas, referred to in the petition and rule herein, in the manner required by law, and no lawful service thereof was ever made upon him, in that the originals thereof were never exhibited to him, nor was any statement made to him of the contents of the said subpœnas, or of the command thereof, or of the time when the same were returnable, or otherwise, with regard to said subpœnas, all of which more fully appears in the affidavit of the respondent hereto annexed.

Wherefore, this respondent asks that the rule herein be denied and dismissed.

HENRY W. KILLEEN, *Respondent.*

206 STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Henry W. Killeen, being duly sworn, deposes and says:
That he is the respondent in the foregoing proceeding; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY W. KILLEEN.

Sworn to before me this 31st day of March 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

207 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

against

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

UNITED STATES OF AMERICA,
Western District of New York,
County of Erie, City of Buffalo, ss:

Henry W. Killeen, being duly sworn, says:
I am a member of the firm of Penney, Killeen & Nye, which firm is counsel of record for Asa K. Silverthorne, Frederick W. Silverthorne and Silverthorne Lumber Company, Inc., in an action or proceeding, pending in this court, wherein an indictment has been found against them jointly, together with one McConkey and one Woodworth, as defendants, on a charge of conspiracy. The individual defendants, Silverthornes, were arrested on said charge on February 25, 1919, and arraigned before the United States Commissioner on the morning of that day. At the same time United States marshals, together with railroad police, raided the offices of the Silverthorne Lumber Company, Inc., at North Tonawanda, New York, and unlawfully seized and carried out a large number of books, papers and documents and memoranda.

208 Thereafter the said Silverthorne Lumber Company and Asa K. Silverthorne each commenced a proceeding in this court for the return of the papers and documents belonging to each of them separately, which were so seized and taken, and such steps were duly had and taken in said proceedings. That by a rule of this court, granted March 4, 1919, the papers of the said Asa K. Silverthorne were ordered returned to him, and by a rule, duly granted March 6,

1919, the books, papers, etc., of the Silverthorne Lumber Company, Inc., were ordered returned to it. Said papers, or some of them, possession whereof was admitted or acknowledged by the District Attorney, were thereafter returned at the office of Penney, Killeen & Nye, and the papers returned were receipted for by me. The claim of the said company and the said Silverthorne is that many of the books, papers and documents taken in said unlawful raid were not returned.

The papers returned were left with me temporarily by Mr. Asa K. Silverthorne, in his behalf, and by Frederick W. Silverthorne as president of, and on behalf of the Silverthorne Lumber Company, Inc. Within a day or two thereafter, the books, papers and documents were checked and gone over for the purpose of ascertaining, so far as possible, what books, papers and documents had not been returned, but had been retained, and thereupon Asa K. Silverthorne took into his own possession the books, papers and documents owned, or claimed to be owned by him, and the Silverthorne Lumber Company, Inc., through its president, took into its possession the
209 books, papers and documents owned, or claimed to be owned by it. A large number of said books, papers and documents were taken away from my office by the parties entitled thereto, or claiming to be entitled thereto, and some of them, as I understand it, were left in my office as a matter of convenience, in the expectation that examination thereof, or reference thereto, would be necessary in connection with the pending case. The criminal charge resulted in an indictment of the defendants above mentioned, upon which the defendants were arraigned on the 11th day of March 1919.

On or about March 21, 1919, a deputy United States marshal came to my office at my telephone request (it having come to my knowledge that he was endeavoring to serve some papers on me), and I asked him if he desired to serve anything on me. He said he had some subpœnas for me and handed me six papers folded together and bound with a rubber band; he also stated to me that he had the original subpœnas in his possession, and at the same time exhibited a similar bundle of papers folded and bound with a rubber band. He stated that he also had papers to serve upon Frederick W. Silverthorne. I told him that I would arrange with Mr. Silverthorne to be in my office on the following morning, March 22nd, at which time he could serve Mr. Silverthorne with any papers that he had for service. On the following morning, at about 9:30 or 10 o'clock, Mr. Silverthorne came to my office, pursuant to appointment. The marshal appeared later. The service, or attempted service, of the
210 papers on Mr. Silverthorne was made in my presence and hearing, and I saw and heard all that was said and done in connection therewith. The marshal came into my private office, produced a bundle of folded papers, made some remark about having had so much trouble to make service, and either handed the bundle to Mr. Silverthorne, or laid it on the desk in front of Mr. Silverthorne. No other act was done and no other word was said as part of the making of service or attempted service, and the marshal left the room.

Upon examination I discovered that the papers delivered to F. W. Silverthorne were copies alike in manner and form to the copies delivered to me on the previous day. The papers delivered to me and the papers delivered to F. W. Silverthorne consisted of six papers, purporting to be copies of a subpœna, addressed to Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y. I was never served with any subpœna directed to me or calling upon me personally to produce any books or papers. No original subpœnas were exhibited to me at the time of service on me, except that the marshal held in his hands a bundle of papers, closed and folded, which he said were originals. No original subpœnas were exhibited to F. W. Silverthorne. No statement was made to me of the contents of the subpœnas, or of the command thereof, nor was any such statement made to Mr. Silverthorne. The papers delivered to Mr. Silverthorne were left by him with me, and they were not addressed to him, but in like manner to the Silverthorne Lumber Co., Inc.

As one of the attorneys for the Silverthorne Lumber Company, Inc., I had no control or power over any of its books, papers
211 or documents, either before or after the time of the delivery of the papers to me, and I had no legal or lawful right to deliver any papers, belonging to said Company, to any person whomsoever. I supposed that the copies of subpœnas were delivered to me by way of notice to me as attorney, and that when I thereupon arranged to give the marshal an opportunity to make proper and lawful service upon the corporation, I had discharged all of the duty and more that was incumbent upon me by reason of the circumstances.

HENRY W. KILLEEN.

Sworn to before me this 31st day of March 1919.

E. M. KREISS,
Commissioner of Deeds, Buffalo, N. Y.

212 At a Term of the United States District Court Held at the Federal Building, in the City of Buffalo, Western District of New York, on the 1st Day of April, 1919.

Present: Hon. John R. Hazel, U. S. District Judge, Presiding.

United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney for the Silverthorne Lumber Company, Inc.

A Rule directed to the above named respondent having been heretofore granted by the Hon. John R. Hazel, United States District

Judge, on the 28th day of March, directing the above named respondents to comply with six certain subpœnas duces tecum heretofore served, originally returnable on March 24th, 1919, by producing the books and papers mentioned in said subpœnas before the Grand Jury of this Court, at the Federal Building, Buffalo, N. Y., on the first day of April, 1919, at ten o'clock in the forenoon, and directing that in the event that said respondent- do not so comply with said subpœnas that they show cause at a term of this Court on the first day of April, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard, why the said respondents
213 should not be adjudged guilty of the contempt of this Court, for their failure to so comply with the said subpœnas, and punished therefor as the Court should deem proper, and said Rule having regularly come on for argument at a term of this Court on the first day of April, 1919, at 2 o'clock in the afternoon, the United States of America having appeared by Carl Sherman, Assistant United States Attorney, the respondents having appeared by Henry W. Killeen and James O. Moore, of counsel, and the said Silverthorne Lumber Company, Inc., Frederick W. Silverthorne and Henry W. Killeen having duly filed their answer to the Rule to show cause, and the respondent Frederick W. Silverthorne having personally appeared in open court and having stated that he had failed and refused to produce the books and papers mentioned in said six subpœnas duces tecum, and that he still refused so to do, and it satisfactorily appearing to the Court that a certified copy of said petition and rule to show cause had been duly served upon each of the respondents, now on motion of Stephen T. Lockwood, United States Attorney, it is

Ordered and adjudged that the respondent Silverthorne Lumber Company, Inc. be and it hereby is found guilty in contempt of this court in failing and refusing to comply with the six subpœnas duces tecum served upon it on the 22d day of March, 1919, and in failing and refusing to comply with the order of this court dated the 28th day of March, 1919, and that said Silverthorne Lumber Company, Inc. be fined the sum of two hundred and fifty ($250) dollars, for such contempt, and that execution issue therefor.

214 And it is further ordered and adjudged that Frederick W. Silverthorne individually and as president of said Silverthorne Lumber Company, Inc. be found guilty of the contempt of this court, in failing and refusing to comply with the six subpœnas duces tecum heretofore duly served upon him individually and as such president of said Silverthorne Lumber Company, Inc. and for failing and refusing to comply with the order of this court dated the 28th day of March, 1919, and that said Frederick W. Silverthorne be, therefore remanded in the custody of the United States Marshal and confined to the County Jail in Erie County, Western District of New York until he do comply with said six subpœnas duces tecum or be otherwise purged of said contempt.

And it is further ordered and adjudged, that said Rule to show cause be and the same is hereby denied as to the respondent Henry W. Killeen.

[Seal of the Court.]

JOHN D. HAZEL, *D. J.*

215 *Extract from Proceedings on Return of the Rule to Show Cause.*

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(Short recess taken.)

The Court: Is Mr. Silverthorne here?
Mr. Moore: Yes, sir.
The Court: Step forward. You are Frederick W. Silverthorne?
Mr. Silverthorne: Yes, sir.
The Court: You were served with this subpœna dated March 21st, 1919?
Mr. Silverthorne: Yes, sir.

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*(See Post.)

The Court: You are directed by the Court to comply with this subpœna duces-tecum and produce the books and papers in your possession, or under your control as president of the Silverthorne Lumber Company, and to answer any questions that may be put to you in relation thereto, and required to appear before the grand jury for that purpose; are you willing to do so?
Mr. Silverthorne: No sir, I do not intend to incriminate the company.
The Court: You are adjudged in contempt of court and you will be imprisoned in the county jail of Erie County until the order of the Court and of the subpœna duces tecum is complied with. You are remanded to the custody of the marshal.
Mr. Moore: Is there any order against the corporation? The corporation is a party.
The Court: I will fine the corporation $250.00.

(Discussion relative to bail, etc.)

The Court: I have regarded the question of whether a corporation can be compelled to produce their books, papers, etc.,
216 pending an inquiry before a grand jury to be quite well settled by the Supreme Court of the United States, and by the district courts who follow that decision, not only in this circuit, but other circuits, and it seemed to me the question was no longer open, and that it was quite well established that a corporation could be compelled to produce its books and papers where a criminal charge is asserted against it. Moreover, that an officer of a corporation, having the custody and control of the books and papers

can be compelled to appear before the grand jury and produce the books of the corporation. In my view of it, after reading these cases, to which my attention has been drawn during these hearings, a corporation is not immune from giving testimony against itself. A corporation is a creature of the state, and because it is such, it cannot commit crimes and offenses against the laws of the people of this nation, and when these offenses are disclosed in its books, it cannot refuse to surrender them for inquiry and investigation by the grand jury. That has been my opinion regarding this matter from the very beginning, and since I deem this question settled by the decisions of the Supreme Court a serious doubt is in my mind as to whether an application for a supersedeas is made in good faith. The grand jury is in session now, and has been in session for some time, and its duties are seriously interfered with by the action of the officers of this corporation. From the very beginning, this grand jury,—I am informed,—has been desirous of investigating into the affairs of this corporation, for the purpose of ascertaining whether a crime has been committed or not; it has been interfered with from the very beginning, and obstacles thrown in its way,—the books which it required have been withheld,—and I think there is some reason to the argument by the District Attorney that
217 this application is not made in good faith.

* * * * * * *

The Court: You are closing your eyes to the holding of the Supreme Court of the United States, and even if the books are improperly produced,—improperly brought before the grand jury,—even after they are inquired into when the Government had no right to do so, that point is saved to you upon the trial. This is an inquiry which the grand jury has the right to make; whether the books themselves are competent evidence against the corporation is another question; that is something that may be determined on the trial; if the books should be received over your objection, you have your remedy by exception and writ of error and review; if the books are received upon the trial, and the Court erroneously receives them, there is not the slightest doubt but that the higher courts would reverse the lower court, if there should be a conviction in the case.

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*These questions were asked of Frederick W. Silverthorne for the purpose of identification and not for the purpose of nullifying his defense that subpœnas duces tecum were not legally served upon him.

218 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

Now comes the Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne by Penney, Killeen and Nye, their attorneys, and make and file this assignment of errors upon which they will rely in the prosecution of the writ of error in the above entitled cause from the judgment granted by this Honorable Court on the first day of April, 1919, adjudging said defendants to be guilty of contempt of Court and imposing fines and penalties upon them and imprisonment upon the defendant, Frederick W. Silverthorne.

First. The United States District Court for the Western District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the

219 books, papers and documents named in said six several subpœnas duces tecum for the reason that all of the said books, papers and documents required to be produced by said six several subpœnas duces tecum were seized by United States Marshals and representatives of the United States District Attorney for the Western District of New York, after an unreasonable search of the premises of said Silverthorne Lumber Company, Inc. on February 25th 1919, and were carried away by the said officials of the United States, were for upwards of ten days unlawfully detained by Stephen T. Lockwood, United States District Attorney for the Western District of New York, and that their contents were examined, copies and photographs were made thereof and excerpts were taken therefrom by the said United States District Attorney, his representatives and agents, and that the said books, papers and documents, so as aforesaid unlawfully seized, were, while thus unlawfully detained, offered and received in evidence before the Grand Jurors of the United States District Court for the Western District of New York, in session for the month of February, 1919, at the Federal Building, in the City of Buffalo, New York, and that such evidence was used to find an indictment returned by said Grand Jurors against the Silverthorne Lumber Company, Inc., and its officers and others of the crime of conspiracy against the United States, all contrary to the 4th Amendment to the Constitution of the United States.

Second. The United States District Court for the Western
220 District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that the information and knowledge of the books, papers and documents specified in said six several subpœnas duces tecum were obtained against said Silverthorne Lumber Company, Inc. in violation of the 4th Amendment to the Constitution of the United States, by the means of an unreasonable search and seizure of the books, papers and documents by Stephen T. Lockwood, United States District Attorney for the Western District of New York, and John D. Lynn, United States Marshal for the Western District of New York, their deputies, agents and servants, who were required by the order of the United States District Court for the Western District of New York to return to the said Silverthorne Lumber Company, Inc. all of said books, papers and documents, and who have failed to comply with said order by not returning all of said books, papers and documents.

Third. The United States District Court for the Western District of New York erred in granting the judgment entered April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court
221 in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that the said six several subpœnas duces tecum, collectively and regarded as a single subpœna, are unreasonable in that they require the production of all of this defendant's books, papers and documents pertaining to its business, and would be constituting an unreasonable search and seizure of this defendant's books, papers and documents, in violation of the 4th Amendment to the Constitution of the United States.

Fourth. The United States District Court for the Western District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces papers and documents is in violation of the privileges and immunities tend to incriminate the Silverthorne Lumber Company, Inc., and that the compulsory production of the same would constitute an unreasonable search and seizure by officials of the United States of the Silverthorne Lumber Company's papers and effects, contrary to the 4th Amendment to the Constitution of the United States.

Fifth. The United States District Court for the Western
222 District of New York erred in granting the judgment entered April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas for the reason that the compulsory production of the said books, papers and documents in violation of the privileges and immunities guaranteed the Silverthorne Lumber Company, Inc. against being subjected to unreasonable searches and seizures of its papers and effects.

Sixth. The United States District Court for the Western District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendant, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that the said books, papers and documents would tend to incriminate said Silverthorne Lumber Company, Inc., and that the said Silverthorne Lumber Company, Inc. having asserted its privilege, the compulsory production of said books, papers and documents
223 would be in violation of the 5th Amendment to the Constitution of the United States.

Seventh. The United States District Court for the Western District of New York erred in granting the judgment entered April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that the compulsory production of the said books, papers and documents is in violation of the privileges and immunities guaranteed the Silverthorne Lumber Company against being compelled to incriminate itself.

Eighth. The United States District Court for the Western District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendants, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that it denies the Silverthorne Lumber Company, Inc. the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States.

224 Ninth. The United States District Court for the Western District of New York erred in granting the judgment entered on April 1st, 1919, adjudging the defendant, Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, guilty of contempt of Court in refusing to comply with the directions of the said six several subpœnas duces tecum, named in the petition herein and for failure to produce before the said Grand Jury of said Court, the books, papers and documents named in said six several subpœnas duces tecum for the reason that each of said subpœnas duces tecum required the production of the private books, papers and documents of Asa K. Silverthorne and that the Court did not determine which of said books, papers and documents belong to said Asa K. Silverthorne personally and excuse their production.

Tenth. The United States District Court for the Western District of New York erred in granting the judgment entered April 1st, 1919, committing Frederick W. Silverthorne for contempt of Court for the reason that said Frederick W. Silverthorne was not legally personally served with said six subpœnas duces tecum or with any of them.

Wherefore, the defendants pray that said judgment be reversed and that the fines and penalties imposed therein be remitted and that the defendant, Frederick W. Silverthorne be discharged from the custody of the United States Marshal for the Western District
225 of New York and that an order be entered accordingly.

THOMAS PENNEY,
HENRY W. KILLEEN,
OLIN T. NYE,
Solicitors and Attorneys for Defendants.

JAMES O. MOORE,
Of Counsel.

226 United States District Court for the Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

And now comes the Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne, the plaintiffs in error, and pray for a reversal of the order of the United States District Court for the Western District of New York in the proceeding brought by the Silverthorne Lumber Company, Inc., to quash six several subpœnas duces tecum issued against it, which said order was entered in the Clerk's Office of the United States District Court for the Western District of New York, on the 26th day of March, 1919, and for a reversal of the

judgment of the United States District Court for the Western District of New York, entered herein on the 1st day of April, 1919, adjudging the plaintiffs in error to be guilty of contempt of Court, for failing to comply with six several subpœnas duces tecum directed to the Silverthorne Lumber Company, Inc. and requiring it to produce its books and papers and documents before the Grand Jury of said Court.

Dated: April 1st, 1919.

PENNEY, KILLEEN & NYE,
Solicitors and Attorneys for Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, 858 Ellicott Square, Buffalo, New York.

227 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

To the Hon. Edward Douglass White, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Court:

And now comes the Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne individually and as President of the Silverthorne Lumber Company, Inc., defendants in the above entitled cause by Penney, Killeen and Nye, their attorneys and show by this petition to the Honorable Court that on April 1st, 1919, a judgment was granted and entered in said cause adjudging these defendants guilty of contempt of Court and imposing fines and penalties upon them and each of them and committing defendant Frederick W. Silverthorne, to the custody of the United States Marshal for said District until compliance was had with six several subpœnas duces tecum issued out of said Court and that in the record, proceedings and decisions in the United States District Court for the West-
228 tern District of New York, manifest error has occurred greatly to the damage of said defendants, as appears in the record and proceedings of the case and by the assignment of errors filed with the Clerk of said Court.

That in the granting of said judgment there was drawn in question the construction and application of the Constitution of the United States, all of which fully appears in the said record and proceedings of the case and specifically set forth in the said assignment of errors.

Wherefore, petitioners pray that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which the

said judgment was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such Court in such cases made and provided, and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

Dated April 1st, 1919.

(Signed) PENNEY, KILLEEN & NYE,
THOMAS PENNEY,
HENRY W. KILLEEN,
OLIN T. NYE,
Attorneys and Solicitors for Defendants Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne.

229 In the Supreme Court of the United States, March Term, 1919.

United States District Court, Western District of New York.

UNITED STATES OF AMERICA

VS.

SILVERTHORNE LUMBER COMPANY, INC.; FREDERICK W. SILVERTHORNE, Individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen, Individually and as Attorney of the Silverthorne Lumber Company, Inc.

Order of Allowance of Writ of Error.

On this 1st day of April, 1919, the application of the Silverthorne Lumber Company, Inc., Frederick W. Silverthorne, individually and as President of the Silverthorne Lumber Company, Inc., the two defendants in this action, adjudged guilty of contempt of Court for a writ of error came on to be heard, said defendants being represented by Counsel, and it appearing to the Court from the petition filed herein and from the record filed therewith that their application should be granted, and that a transcript of the record, proceedings and papers, upon which the order of the Court was rendered properly certified, should be sent to the Supreme Court of the United States as prayed, in order that such proceedings may be had as may be just.

Now, therefore, it is ordered that a writ of error be allowed
230 and upon bond being furnished by the defendants Silverthorne Lumber Co. Inc. conditioned according to law in the sum of $500.00 and that the said writ of error and bond, when furnished, shall operate as a supersedeas and the Clerk is hereby directed to stay the mandate of the District Court for the Western District of New York until the further order of this Court and that a true copy of the record, assignment of error and all proceedings in the case in the United States District Court for the Western District of New York shall be transmitted to the Supreme Court of the United

States, duly certified according to law, in order that the said Court may inspect the same and take such action therein as it deems proper according to law.

Dated April 2, 1919.

(Signed) JOHN R. HAZEL, *D. J.*

231 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the cause, which is in the said District Court, before you, between the United States of America, plaintiff and Silverthorne Lumber Company Inc., Frederick W. Silverthorne individually and as President of the Silverthorne Lumber Company, Inc., and Henry W. Killeen individually and as attorney of the Silverthorne Lumber Company, Inc., a manifest error hath happened, to the great damage of the said Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, as by their complaint it appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington, on the second day of May, 1919, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,
232 and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 2nd day of April in the year of our Lord one thousand nine hundred and nineteen.

(Signed) S. W. PETRIE,
Clerk of the United States District Court
for the Western District of New York.

Allowed by
(Signed) JOHN R. HAZEL,
United States District Judge.

233 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

ASA K. SILVERTHORNE and FREDERICK W. SILVERTHORNE.

On reading and filing the petition of Stephen T. Lockwood, verified the 18th day of March, 1919, whereby it satisfactorily appears that certain books, papers and documents mentioned and described in the annexed præcipes dated March 18, 1919, are material and necessary evidence for the Grand Jury proceedings about to be instituted in the above entitled proceeding:

Now, on motion of Stephen T. Lockwood, United States Attorney, it is,

Ordered that the Clerk of the Court issue subpœnas duces tecum to Silverthorne Lumber Co., Inc. of North Tonawanda, N. Y. to produce the books, papers and documents mentioned and described in the annexed præcipes.

JOHN R. HAZEL,
District Judge.

234 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

ASA K. SILVERTHORNE and FREDERICK W. SILVERTHORNE.

The petition of Stephen T. Lockwood respectfully shows:

First. That your petitioner is the Attorney of the United States in and for the Western District of New York.

Second. That a regular Grand Jury of this Court is now in session, and that your petitioner intends to present evidence before said Grand Jury with reference to an alleged unlawful conspiracy on the part of Asa K. Silverthorne and Frederick W. Silverthorne, to defraud the United States.

Third. That your petitioner has reason to believe that Asa K. Silverthorne and Frederick W. Silverthorne so engaged in said alleged illegal conspiracy made false and fraudulent claims for sums of money upon the United States Railroad Administration for lumber claimed to be delivered to said United States Railroad Administration, which lumber was in fact not so delivered, and that said persons so engaged in said conspiracy did obtain various sums of money by virtue of said false and fraudulent claims.

Fourth. That the Silverthorne Lumber Co. Inc., of North Tonawanda, N. Y., is a domestic corporation, and that your petitioner has reason to believe that Asa K. Silverthorne and Frederick W.

Silverthorne, alleged to have engaged in the aforesaid illegal
235 conspiracy, made shipments of lumber to the United States Railroad Administration pursuant to said conspiracy through the said Silverthorne Lumber Co. Inc.

Fifth. That your petitioner has reason to believe that the said alleged conspiracy and the overt acts pursuant thereto were committed during the period of time commencing January 1st, 1918, and ending March 6th, 1919.

Sixth. That the said Silverthorne Lumber Co. Inc. has in its possession, certain books, papers, records, documents and memoranda, which contain material and necessary evidence of overt acts committed by Asa K. Silverthorne and Frederick W. Silverthorne, and tend to show and contain evidence of an illegal conspiracy on the part of said persons. That said papers, books, records and memoranda are material and necessary evidence of said conspiracy, and of such overt acts to show or tend to show the amount of lumber delivered, the sums paid therefor, the disposition of said sums, and the identity of the persons connected with the delivery and disposition of said lumber and the sums of money paid therefor. That hereto annexed and made a part of this petition are præcipes for subpœnas duces tecum issued by the United States Attorney, and that each of the books, papers and records mentioned in said præcipes are material and necessary as evidence for the purposes hereinbefore set forth.

Seventh. That the United States Attorney intends to present said books, papers and records to the said Grand Jury on the 19th day of March, 1919.

Wherefore, your petitioner prays for an order directing that subpœnas duces tecum be issued by the Clerk of this Court directed to the said Silverthorne Lumber Co. Inc. returnable at 10 o'clock A. M. on the 21st day of March, 1919, and commanding said Silver-
236 thorne Lumber Co. Inc. to bring the books, papers and records mentioned in the annexed præcipes before the Grand Jury at the Federal Building, Buffalo, District and State aforesaid.

STEPHEN T. LOCKWOOD,
The Attorney of the United States in and for the Western District of New York.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

Stephen T. Lockwood, being duly sworn deposes and says, that he has read the foregoing petition and know- the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

STEPHEN T. LOCKWOOD.

Sworn to before me this 18th day of March, 1919.

FRANCES E. KERWIN,
Notary Public, Erie Co., N. Y.

237 *Præcipe for Witnesses before Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for—

Names.	Names.	Residence.
Silverthorne Lumber Co. Inc.,	Little Island,	North Tonawanda, N. Y.

Duces tecum to produce:

1. Journals of Silverthorne Lumber Co. Inc. marked Journal No. 2 and Journal No. 3, for the period commencing Jan. 1st, 1918, and ending March 1st, 1919.
2. Ledgers of Silverthorne Lumber Co. Inc., showing current accounts of said Silverthorne Lumber Co. Inc., for the period commencing Jan. 1st, 1918, and ending March 1st, 1919.
3. Check, and check stub books of Silverthorne Lumber Co. Inc. for period commencing July 1st, 1918, and ending March 1st, 1919.
4. Invoice copy books of Silverthorne Lumber Co. Inc., for period commencing July 1st, 1918, and ending March 1st, 1919.
5. Stock Certificate book of Silverthorne Lumber Co. Inc.
6. Stock book of Silverthorne Lumber Co. Inc.
7. Minute book book of Silverthorne Lumber Co. Inc. for period commencing Jan. 1, 1918 to March 1, 1919.

to appear before said court at Buffalo, N. Y. on the 21st day of March, 1919, at 9 o'clock A. M., to testify before the grand jury, and generally on behalf of the United States.

This 18 day of March, 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

238 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Inc., by handing to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company Inc. personally, at Buffalo, in said District on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company, Incorporated, by handing to and leaving a true and correct copy thereof with Frederick W. Silverthorne, President, of Silverthorne Lumber Company, Inc. personally at Buffalo, in said District on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

239 *Præcipe for Witnesses Bevore Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for Silverthorne Lumber Company, Inc., Little Island, North Tonawanda, N. Y.

Duces tecum to produce:

1 bank book marked "Fred'k Robertson & Co. Bankers North Tonawanda New York in account with Silverthorne Lumber Co. Inc. Special, covering period from December 28 1917 to November 1st 1918, both inclusive; also paid checks of Silverthorne Lumber Company Special Account paid through Fred'k Robertson & Company, Bankers, North Tonawanda, numbered and dated as follows:

No. 5280, Sept. 27, 1918, payable to Cash for $500.00, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5281, Sep 26 1918, payable to Silverthorne Lumber Co. Inc., amount $2292.88, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President; endorsed on back "Pay to the Order of Fred'k Robertson & Co. Bankers, North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co. Inc."

No. — Oct 14, 1918, payable to Cash, amount $9824.31, signed by Silverthorne Lu Co Inc Special A. K. Silverthorne.

No. — Oct. 15 1918, payable to Cash, amount $5258.00, signed by Silverthorne Lu Co Inc A. K. Silverthorne Pres Spec

No. 5275 Oct 18 1918, payable to Cash, amount $974.89, signed by Silverthorne Lumber Company, Inc., Special A. K. Silverthorne President Spec

No. — Oct 21 1918, payable to Cash (Dft A J Wright & Co) amount $769.75, signed by Silverthorne Lu Co Inc Special A K Silverthorne Pres

No. 5272 Oct 24, 1918, payable to Fredk Robertson & Co. amount

$10,000.00 signed by Silverthorne Lumber Company, Inc. A. K Silverthorne President

No. 5271 Oct 25 1918, payable to order of dft for F. J. Shields, amount $100.00, signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

No. 5277 Oct. 5 1918, payable to Silverthorne Lumber Co., Inc. amount $159.74, signed by Silverthorne Lumber Company Inc. A. K. Silverthorne President; endorsed on back "Pay to the
240 order of Fred'k Robertson & Co. Bankers North Tonawanda, N. Y. Silverthorne Lumber Co. Silverthorne Lumber Co., Inc."

No. — Nov 12 1918, payable to Cash amount $55.60, signed by Silverthorne Lu Co Inc A K Silverthorne

No. 5270, Nov. 1 1918, payable to Cash, amount $200.00 signed by Silverthorne Lumber Company, Inc. A. K. Silverthorne President.

to appear before said court at Buffalo, on the 21st day of March, 1919, at 9 o'clock A. M. to testify before the grand jury, and generally on behalf of the United States.

This 18 day of March, 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

241 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed Subpœna, on the therein named Silverthorne Lumber Company Inc. by handing to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company, Inc. personally, at Buffalo, in said District on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Inc. by handing to and leaving a true and correct copy thereof with Frederick W. Silverthorne, President of Silverthorne Lumber Company Inc. personally at Buffalo, in said District on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

242 *Præcipe for Witnesses before Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for Silverthorne Lumber Co., Inc., Little Island, North Tonawanda, N. Y.

Duces tecum to produce:

1. Bill of lading receipts for cars of lumber shipped by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.
2. Freight bills, letters and copies of letters, invoices and copies of invoices, relating to shipments of lumber received and shipped by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.
3. Receipts for payments by Silverthorne Lumber Co. Inc., for lumber for period commencing Jan. 1st, 1918, and ending March 1, 1919.
4. Record of profits and losses on shipments of lumber by Silverthorne Lumber Co. Inc., for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

to appear before said court at Buffalo, N. Y., on the 21 day of March, 1919, at 9 o'clock A. M. to testify before the grand jury, and generally on behalf of the United States.

This 18 day of March, 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

243 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company, Inc., by handing to and leaving a true and correct copy thereof with Frederick W. Silverthorne, President of Silverthorne Lumber Company Inc., at Buffalo, in said District, on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

244 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company, Inc., by handing

to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company Inc., at Buffalo, in said District, on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

245 *Præcipe for Witness before Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for Silverthorne Lumber Co. Inc., Little Island, North Tonawanda, N. Y.

Duces tecum to produce:

Order cards of shipments of lumber by Silverthorne Lumber Co. Inc. to Shingle Mills Selling Co., and United States Railroad Administration operating the Lehigh Valley Railroad, Erie Railroad, New York Central Railroad, Philadelphia and Reading Railroad and Delaware, Lackawanna and Western Railroad, for the period commencing January 1st, 1918 and ending March 1st, 1919, which cards are recorded and numbered as follows:

Record No. 108, customer's order 32961
" " 244, " " G. P. 3146
" " 144, " " 1370-Y
" " 179, " " 3374-L
" " 56, " " 7944, endorsed Thos. E. Coal Lumber Co. with 6 cards attached.
" " 275, " " 3377,
" " 271, " " 19
" " 220, " " 9625, marked Thos. E. Coal Lumber Co.
" " 264, " " 12
" " 261, " 52697
" " 241, " 44417
" " 237, " 44419
" " 236, " 44428, with extra card attached.
" " 234, " 44401
" " 232, " 44402
" " 231, " 42183
" " 227, " 39593
" " 191, " 33325
" " 193, " ..... marked Erie R. R. Co. care C. D. Dearworth, Huntington, Indiana.
" " 190, " 33313
" " 188, " 33300
" " 163, " 26787
" " 124, " 20945 with sheet attached.
" " 122, " 20932
" " 105, " 15043
" " 50, " 6484
" " 11, " 56720
" " 3, " 218
" " 181, " 1751, marked Shingle Mills Selling Co. with three cards attached.

246 to appear before said court at Buffalo, on the 21 day of March, 1919, at 9 o'clock A. M. to testify before the grand jury, and generally on behalf of the United States.

This 18th day of March 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

247 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Inc., by handing to and leaving a true and correct copy thereof with Frederick W.

Silverthorne, President of Silverthorne Lumber Company Inc., personally at Buffalo, in said District on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Inc., by handing to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company, Inc. personally at Buffalo, in said District on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

248 *Præcipe for Witnesses Before Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for—

Names.	Names.	Residence.
Silverthorne Lumber Co., Inc.,		Little Island, No. Tonawanda, N. Y.

Duces tecum to produce:

Tally books showing tally of shipments of lumber by Silverthorne Lumber Co. Inc. to Shingle Mills Selling Co. and United States Railroad Administration operating the Lehigh Valley Railroad, Erie Railroad, New York Central Railroad, Philadelphia and Reading Railroad, Delaware, Lackawanna & Western Railroad for the period commencing January 1st, 1918, and ending March 1st, 1919 which tally books are numbered and described as follows:

Tally	Book	No.	1,	Exhibit	No.	63
"	"	"	1,	"	"	83
"	"	"	2,	"	"	59
"	"	"	3,	"	"	68
"	"	"	4,	"	"	17
"	"	"	5,	"	"	66
"	"	"	4,	"	"	60
"	"	"	6,	"	"	72
"	"	"	7,	"	"	18
"	"	"	8,	"	"	21
"	"	"	9,	"	"	20
"	"	"	10,	"	"	67
"	"	"	11,	"	"	71
"	"	"	11,	"	"	76
"	"	"	12,	"	"	27
"	"	"	12,	"	"	77
"	"	"	15,	"	"	5
"	"	"	16,	"	"	6
"	"	"	17,	"	"	7
"	"	"	20,	"	"	4
"	"	"	26,	"	"	28
"	"	"	10,	"	"	69
"	"	"	36,	"	"	29
"	"	"	10,	"	"	70
"	"	"	36,	"	"	74
"	"	"	39,	"	"	57
"	"	"	36,	"	"	73
"	"	"	6,	"	"	64
"	"	"	37,	"	"	75
"	"	"	7,	"	"	26
"	"	"	50,	"	"	61
"	"	"	24,	"	"	62
"	"	"	19,	"	"	9
"	"	"	3,	"	"	19
"	"	"	27,	"	"	16
"	"	"	61,	"	"	56
"	"	"	18,	"	"	8

249 to appear before said court at Buffalo, on the 21 day of March, 1919, at 9 o'clock A. M., to testify before the grand jury, and generally on behalf of the United States.

This 18th day of March, 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

250 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company, Incorporated, by handing to and leaving a true and correct copy thereof with Frederick W. Silverthorne, President of Silverthorne Lumber Company, Inc., personally, at Buffalo, in said District on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

251 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company, Inc., by handing to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company, Inc., personally at Buffalo, in said District on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

252 *Præcipe for Witnesses Before Grand Jury.*

Western District of New York.

The Clerk of the United States District Court will issue subpœna for Silverthorne Lumber Co. Inc., Little Island, North Tonawanda, N. Y.

Duces Tecum to produce:

1. Cancelled check vouchers of account of Silverthorne Lumber Company, Inc., with Frederick K. Robertson & Company, Bankers, North Tonawanda, N. Y. for period commencing January 1, 1918, and ending March 1, 1919.
2. Inspection reports of cars of lumber shipped by Silverthorne Lumber Company, Inc. as follows: On car No. 3665, initialed P. & K. dated Jan. 11, 1919; on car No. 335943 initialed Sou; on car No. 32054, initialed Sou. dated 10, 18, 18. on car No. 234129, initialed N. Y. C. dated 10/18/18; and on all cars of lumber shipped between Jan. 1, 1918, and March 1, 1919.

3. Bills of Lading and Copies of Bills of lading for shipments of lumber to and by Silverthorne Lumber Company, Inc. for period commencing Jan. 1st, 1918, and ending March 1st, 1919.

to appear before said court at Buffalo, N. Y. on the 21 day of March, 1919, at 9 o'clock, A. M. to testify before the grand jury, and generally on behalf of the United States.

This 18 day of March, 1919.

STEPHEN T. LOCKWOOD,
U. S. Attorney.

253 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Incorporated, by handing to and leaving a true and correct copy thereof with Frederick W. Silverthorne, President of Silverthorne Lumber Company, Inc., personally at Buffalo, in said District on the 22nd day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

254 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed subpœna on the therein-named Silverthorne Lumber Company Inc., by handing to and leaving a true and correct copy thereof with Henry W. Killeen, Attorney for Silverthorne Lumber Company, Inc., personally at Buffalo, in said District on the 21st day of March, A. D. 1919.

JOHN D. LYNN,
U. S. Marshal,
By A. J. LEZZYNSKI, *Deputy.*

255 United States District Court, Western District of New York.

UNITED STATES OF AMERICA

vs.

ASA K. SILVERTHORNE and FREDERICK W. SILVERTHORNE.

A subpœna duces tecum having heretofore been directed to be issued by the Clerk of this Court, returnable on the 21st day of March, 1919, and upon statement of the United States Attorney, that service of said subpœna duces tecum could not be made prior to the 21st day of March, 1919,

It is hereby ordered, that the Clerk of this Court issue said sub-

pœna duces tecum so that same shall be returnable the 24th day of March, 1919.

JOHN R. HAZEL,
District Judge.

256 United States District Court, Western District of New York.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, Plaintiffs in Error,

against

UNITED STATES OF AMERICA Defendant in Error.

Know all men by these presents:

That the Silverthorne Lumber Company, Inc., a corporation organized under the laws of the State of New York, having its principal place of business at North Tonawanda, Niagara County, State of New York, and Frederick W. Silverthorne of Buffalo, Erie County, State of New York, and United States Fidelity & Guaranty Company, a surety company authorized to execute bonds of indemnity in the State of New York, having its principal place of business at Baltimore, State of Maryland, are held and firmly bound unto the above named United States of America in the sum of Five hundred dollars ($500.00), to be paid to the said United States of America, for the payment of which well and truly to be made, we bind ourselves, and each of us, and the successors and assigns of the Silverthorne Lumber Company, Inc., and the United States Fidelity & Guaranty Company, and the heirs, executors, administrators and assigns of
257 Frederick W. Silverthorne, jointly and severally firmly by these presents. Sealed with our seals, and dated the 4th day of April, in the year of our Lord one thousand nine hundred and nineteen. Whereas, the above named Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne have prosecuted a writ of error to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause adjudging them guilty of contempt of court, by the Judge of the District Court of the United States for the Western District of New York;

Now, therefore, the condition of this obligation is such, that if the above named Silverthorne Lumber Company, Inc. and Frederick W. Silverthorne shall prosecute said writ of error to effect and answer all damage and costs, if they fail to make such writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

SILVERTHORNE LUMBER COMPANY, INC.,

(Signed) By FREDERICK W. SILVERTHORNE, *President.*

(Signed) FREDERICK W. SILVERTHORNE. [L. S.]

UNITED STATES FIDELITY & GUARANTY CO.,

(Signed) By WILLIAM H. KENNEDY, *Attorney-in-Fact.*

Approved—April 4, 1919.

____ ____,

U. S. District Judge. [SEAL.]

Approved by
(Signed) JNO. R. HAZEL,
United States District Judge for the
Western District of New York.

258 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 4th day of April, 1919, before me personally came Frederick W. Silverthorne, to me known, who, being by me duly sworn, did depose and say: that he resided in the City of Buffalo, New York; that he is the President of the Silverthorne Lumber Company, Inc., the corporation described in, and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) FRANCIS J. MALONEY,
Commissioner of Deeds, Buffalo, New York.

WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 4th day of April, 1919, before me, the subscriber, personally appeared Frederick W. Silverthorne, to me personally known and known to me to be the same person described in, and who executed the within Instrument, and he duly acknowledged to me that he executed the same.

(Signed) FRANCIS J. MALONEY,
Commissioner of Deeds, Buffalo, New York.

259 WESTERN DISTRICT OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 4th day of April, 1919, before me personally came William H. Kennedy to me known, who, being by me duly sworn, did depose and say: that he resided in the City of Buffalo, New York; that he is the Attorney-in-Fact of the United States Fidelity & Guaranty Company, the corporation described in, and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) HELEN G. KENNEDY,
Commissioner of Deeds, Buffalo, New York.

260 At a meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the third

day of January, A. D. 1911, at which was present a quorum of said Directors duly authorized to act in the premises, on motion it was unanimously

Resolved, That in pursuance of Section 811 of the New York Code of Civil Procedure, Edward F. Walsh, Louis C. Walsh and William H. Kennedy, Attorneys-in-fact of the United States Fidelity and Guaranty Company for the Counties of Erie, Niagara, Chautauqua and Cattaraugus, in the State of New York, be and each of them is hereby authorized and empowered to sign, execute and deliver for and on behalf of this Company, any and all bonds or undertakings mentioned or referred to in said Section 811 of said Code, that may be given or required in any Court or legal proceedings in said Counties, or any other bonds or undertakings that may be given or required in any legal proceedings in said Counties; and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company.

CITY OF BALTIMORE,
State of Maryland, ss:

I, Wm. M. Pegram, Assistant Secretary of the United States Fidelity and Guaranty Company, have compared the foregoing
261 Resolution with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company, at Baltimore, Maryland, this 19th day of February, 1919.

(Signed) WM. M. PEGRAM,
[SEAL.] *Assistant Secretary.*

262 *Statement United States Fidelity and Guaranty Company, Baltimore, Md., at the Close of Business December* 31, 1918.

Commenced Business August 1, 1896.

Par value.	Assets.	Market value.
$3,505,975.00	Government Bonds	$3,483,800.00
4,777,081.88	Baltimore City and other Municipal State and County Bonds	4,501,181.87
2,042,600.00	Railroad and Equipment Bonds	1,759,762.50
235,000.00	Electric Railway Bonds	200,300.00
1,981,108.00	Public Utility and Miscellaneous Bonds	1,860,935.50
164,415.00	Bank and Trust Company Stocks	323,748.00
168,600.00	Railroad Stocks	144,577.00
196,300.00	Miscellaneous Stocks	126,065.00
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets.	140,000.00
$13,171,079.88	Total Bonds and Stocks — Market values December 31st, 1918	$12,540,372.87
	Home Office Property appraised by Insurance Department of Maryland	615,000.00
	Other Property appraised by Insurance Department of Maryland	95,567.14
	Loans secured by pledge of Collaterals	11,795.56
	Loans secured by Mortgages	21,800.00
	Cash on Hand and in Depositories	1,679,202.81
	Premiums in course of collection, not more than three months due	2,927,818.68
	Due for subscriptions, Department Guaranteed Attys.	76,931.20
	Deposits with Workmen's Compensation Reinsurance Bureau	301,435.30
	Deposits with New York Excise Committee	84,506.33
	Interest due and accrued	167,916.73
	Other Assets	36,453.32
		$18,658,799.94

263 Liabilities.

Capital Stock paid in cash		$3,000,000.00
Due for Return Premiums and Reinsurance		91,133.16
Funds held under Reinsurance Treaties		34,642.78
Reserve for Taxes and Expenses in Transit		453,000.00
Commissions accrued on uncollected premiums		556,725.42
Premium Reserve Computed in Accordance with Requirements of New York Insurance Department	$6,032,425.42	
Reserve for Claims Admitted and Not Admitted, all Departments, in accordance with New York Laws	6,239,525.73	
Surplus	2,251,347.43	
		14,523,298.58
		$18,658,799.94

(Signed) L. R. SOLLENBERGER,
Vice-President.

(Signed) WM. M. PEGRAM,
[SEAL.] *Assistant Secretary.*

STATE OF MARYLAND,
City of Baltimore, ss:

On this Feb. 18 1919 before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, personally appeared L. R. Sollenberger and Wm. M. Pegram, Vice-President and Assistant Secretary, respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such officers of the said Company, and that the above and foregoing is a full, true and correct statement of the Assets and Liabilities of the said Company, as they appeared upon the books of the said Company on the 31st day of December, A. D. 1918.

In witness whereof, I have hereunto set my hand and offi-
264 cial seal, the day and year aforesaid.

[SEAL.] (Signed) A. D. PATRICK,
Notary Public.

265 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court for the Western District of New York, wherein the Silverthorne Lumber Co. Inc. and

Frederick W. Silverthorne are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John R. Hazel, United States District Judge for the Western District of New York, this 2nd day of April, in the year of Our Lord One thousand nine hundred and nineteen.

(Signed) JOHN R. HAZEL,
United States District Judge for the Western District of New York.

266 United States Supreme Court.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, Plaintiffs in Error,

against

UNITED STATES OF AMERICA, Defendant in Error.

I, Sidney W. Petrie, as Clerk of the United States District Court for the Western District of New York, do hereby certify the foregoing and annexed pages, numbered from and including One (1), to and including two hundred and sixty-five (265) to be a true copy of the entire record of the above entitled cause in the said United States District Court, as the originals thereof remain on file and appear of record in my office.

I attest my hand and the seal of the United States District Court for the Western District of New York, at the City of Buffalo, State of New York, this twenty-fourth day of April, 1919.

[Seal United States District Court, Western District New York.]

SIDNEY W. PETRIE, *Clerk.*

Endorsed on cover: File No. 27,082. W. New York D. C. U. S. Term No. 358. Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, individually and as president of the Silverthorne Lumber Company, plaintiffs in error, vs. The United States of America. Filed April 26th, 1919. File No. 27,082.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SILVERTHORNE LUMBER COMPANY (INC.), and Frederick W. Silverthorne, individually and as president of the Silverthorne Lumber Company, plaintiffs in error,

v.

THE UNITED STATES OF AMERICA.

No. 358.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance this case for argument on an early day of the present term convenient to the court.

The writ of error in this case was taken to a judgment of the United States District Court for the Western District of New York adjudging the Silverthorne Lumber Company and Frederick W. Silverthorne, its president, in contempt in failing and refusing to comply with the directions of six several subpœnas *duces tecum* named in the petition in said case and for failure to produce before the grand jury of said court the books, papers, and documents of the Silverthorne Lumber Company. Said lumber com-

pany was fined $250 and said Frederick W. Silverthorne, who had the custody of said books, committed to jail until he should produce the said books, papers, and documents or be otherwise purged of said contempt.

On June 2 the United States submitted a motion to dismiss the writ of error or affirm the judgment on the ground the questions presented had been foreclosed by prior decisions of this court and that the writ of error had been taken manifestly for delay. On June 9 this court entered an order postponing further consideration of the motion to the hearing on the merits and admitting Frederick W. Silverthorne to bail in the sum of $5,000.

The case is analogous to a criminal case which would be subject to be advanced under the 26th rule. Again, the investigation of other alleged violations of the law by plaintiffs in error which was proceeding at the time said contempt was committed is being retarded pending a decision as to the right to require the production of books, papers, and documents as called for in said subpœnas. Finally, there are pending in the Western District of New York other matters involving the issuance of subpœnas *duces tecum* in which procedure is delayed in view of the pendency of this writ of error.

Opposing counsel have been notified.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 996.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, *Plaintiffs in Error*,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

PETITION OF FREDERICK W. SILVERTHORNE TO BE ADMITTED TO BAIL PENDING DISPOSITION BY THIS HONORABLE COURT OF THE MATTERS COVERED BY THE WRIT OF ERROR HEREIN.

Now comes Frederick W. Silverthorne, one of the parties plaintiff in error above named, and respectfully petitions this Honorable Court that pending consideration and disposition by it of the matters involved in the above entitled cause, your petitioner may be enlarged upon bail on giving of bond with approved surety in such sum as this Court may

direct, and as ground for this petition respectfully states as follows:

1. The plaintiff in error, Silverthorne Lumber Company, Inc., is a corporation under the laws of the State of New York engaged in the business of buying and selling lumber and has and maintains its principal office and place of business, including its lumber yards, at North Tonawanda, in the Western District of the State of New York.

The plaintiff in error, Frederick W. Silverthorne, your petitioner, is and during the occurrences hereinafter set forth, was the President of said Silverthorne Lumber Company, Inc., and his father, Asa K. Silverthorne, hereinafter mentioned, was and is the General Manager of said company, and both your petitioner and said Asa K. Silverthorne resided and do now reside in the city of Buffalo, State of New York, a distance of some twelve (12) miles from the office and lumber yards of said Silverthorne Lumber Company, Inc.

2. At or about 7.30 o'clock on the morning of February 25, 1919, your petitioner, Frederick W. Silverthorne and said Asa K. Silverthorne were arrested at their respective residences in the city of Buffalo by United States Deputy Marshals upon warrants charging them with conspiracy to defraud the United States contrary to the provisions of Section 37 of the Act of Congress of March 4, 1909, Chapter 321, commonly called the Criminal Code (35 Stats. 1088, 1096), and were taken to the office of the United States Marshal for the Western District of New York in said city of Buffalo and there detained for the space of several hours, when, having first been arraigned before an United States Commissioner, both were released upon bail, your petitioner giving bond in the sum of $7,500 and said Asa K. Silverthorne in the sum of $15,000.

3. During the period of their said detention at the office of said United States Marshal on said morning of February 25, 1919, the offices of the plaintiff in error the Silverthorne Lumber Company, Inc., at North Tonawanda, were invaded by a group of men apparently under the general direction and control of a United States Deputy Marshal, who displayed badges of authority and claimed to be acting under authority of a subpoena *duces tecum* issued out of the Clerk's office of the U. S. District Court for the Western District of New York "in regard to the alleged violation of the Statutes of the United States by one John Doe," and such said Deputy Marshal and assistants laid hold and took possession of all the books, papers and documents of said Silverthorne Lumber Company, Inc., constituting all of its ledgers, journals and account books, bank deposit and check books, copies of contracts in course of fulfillment, billing books, loading certificates, tally books, bills of lading, invoices, etc., together with many private books, papers and documents belonging to your petitioner, Frederick W. Silverthorne, and having placed under arrest the entire office and yard force of said plaintiff in error, Silverthorne Lumber Company, Inc., consisting of 12 or more men, proceeded in various automobiles loaded with books, documents and papers aforesaid and certain of said employees, leaving the office and works of said plaintiff in error, Silverthorne Lumber Company, Inc., entirely unprotected, to the court house in the city of Buffalo where said employees were subjected to an examination at the hands of the United States District Attorney and some or all of the books, papers and documents in question were laid before a grand jury then and there in session.

4. Thereafter, plaintiffs in error above named asserting that the alleged subpoena *duces tecum* issued in the so-called

"John Doe" proceedings above referred to, was invalid and that the Silverthorne Lumber Company, Inc., had been subjected to unreasonable search and seizure contrary to the provisions of the Constitution of the United States in such case provided, moved the District Court of the United States for the Western District of New York to issue a rule upon United States District Attorney and the United States Marshal for said District to show cause why said books, records, papers and documents, etc., should not be immediately returned to the owners thereof. Upon consideration of the return made by the officials mentioned to rule to show cause issued in said proceeding, the honorable United States District Judge Hazel, by order dated March 6, 1919, first reciting that "it satisfactorily appears to the Court that the books, papers, memoranda and property and effects were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpoena *duces tecum* in violation of the constitutional rights and privileges of the petitioner" (Silverthorne Lumber Company, Inc.), ordered said United States District Attorney and United States Marshal "and all of the officers and officials of the United States having in their possession any of the aforesaid books, accounts, papers and memoranda, forthwith (to), deliver and return the same to the petitioner, Silverthorne Lumber Company, Inc., and any and all other books, papers and memoranda belonging to the petitioner and pertaining to its business and any and all papers belonging to its employees and officers." Further, that the said officials should also deliver to the Clerk of this Court, copies, excerpts, notations and every and any of said books, documents and memorandum, and any and all photographs, negatives and photostats thereof in order that said clerk might seal the same and "not expose or permit to be exposed same to the inspection of any person whatsoever until further order of the court in the premises."

On the same date, March 6, 1919, petition of the United States District Attorney "for an order to impound in custody of the Clerk of the Court certain books, papers, etc.," of the Silverthorne Lumber Company, Inc., was by said Hazel, D. J., "in all respects denied."

5. Thereafter on or about the 10th day of March, 1919, and notwithstanding the finding of the learned District Judge in the premises as above set forth, said grand jury returned its indictment against Silverthorne Lumber Company, Inc., Asa K. Silverthorne, your petitioner, Frederick W. Silverthorne, and others named therein, charging them with conspiring to defraud the United States of America by falsely invoicing grain door boards sold and delivered to the Lehigh Valley Railroad Company and to other railroad companies while under Federal control at a greater number of feet of such boards than were actually delivered to and received by said railroad companies.

Upon the coming in of said indictment, said Silverthorne Lumber Company, Inc., together with your petitioner, Frederick W. Silverthorne, and others named in said indictment, promptly and without awaiting for the issuance or service upon them of warrants of arrest, appeared at the bar of the District Court and first having pleaded not guilty were enlarged on bail, your petitioner, Frederick W. Silverthorne, being released upon the giving of bail in the sum of $5,000, which said sum of $5,000 was separate and apart from and entirely in addition to the bail piece in the sum of $7,500 heretofore mentioned.

6. Again under date of March 7, 1919, six several subpoenas *duces tecum*, each addressed to "Silverthorne Lumber Company, Inc.," were issued out the United States District Court for the Western District of New York, com-

manding said Silverthorne Lumber Company, Inc., to appear before a grand jury on the 11th day of March, 1919, "to testify and give evidence to alleged violation of the United States Statutes by John Doe," and to bring and produce certain books, papers and documents generally named and indicated in several schedules appended to each of said six subpoenas *duces tecum*, said six schedules when combined pointing out and requiring in general the production of all of the books, papers, documents, etc., of the "Silverthorne Lumber Company, Inc.," above referred to and described.

Under date of March 11, 1919, said Silverthorne Lumber Company, Inc., moved to quash the above mentioned six subpoenas *duces tecum* as illegal and invalid upon various grounds, among others specifically enumerating the following:

(a) That said six subpoenas regarded as a single subpoena are unreasonable in that they require all of your petitioner's books, papers and documents pertaining to its business which has extended for a period of nearly five years and if your petitioner is compelled to comply with said subpoenas it will amount to unlawful search and seizure in violation of the Fourth Amendment to the Constitution.

(b) That said six subpoenas are illegal in that they specially require the production of papers and documents belonging personally to Asa K. Silverthorne, General Manager, of Silverthorne Lumber Company, Inc., who has been arrested on a warrant sworn out before United States Commissioner George A. Keating.

(c) That said six subpoenas are illegal in that it requires petitioner's books, papers and documents which might be used to incriminate it and is therefore in violation of the Fifth Amendment of the Constitution of the United States.

(d) Illegal in that they deny petitioner due process of law afforded by the Constitution of the United States.

(e) Illegal in that they deny petitioner equal protection of the law guaranteed to it by the Constitution of the United States.

(f) Illegal in that there is no proceeding pending or to be prosecuted against any person named John Doe, etc., said John Doe being a mere fiction and not a person who has committed a crime.

(g) Illegal in that they do not allow sufficient time to enable petitioner to properly comply therewith.

(h) Unreasonable in that the District Attorney and United States Marshal and their representatives have not complied with the order granted by this Honorable Court directing the return of petitioner's books, papers and documents.

(i) Knowledge and information of books, papers and documents specified was illegally obtained, by and in an unreasonable search and seizure of petitioner's papers and effects.

Thereafter upon consideration of return to rule to show cause based upon above petition and duly issued and served, said six subpoenas *duces tecum* were ordered to be quashed.

7. Thereafter and notwithstanding all of the above, a further set of six subpoenas *duces tecum*, each and every of which was addressed to the Silverthorne Lumber Company, Inc., alone, and bearing date of March 19, 1919, although the same were not issued or attempted to be served until March 21, 1919, were issued and copies thereof left with your petitioner, which said subpoenas commanded the appearance of the Silverthorne Lumber Company, Inc., together with the production of its books, records and papers as above referred to before a grand jury on the 24th day of March, 1919. Again on March 22, 1919, said Silverthorne Lumber Company, Inc., moved for rule to show cause why

said last mentioned set of six subpoenas *duces tecum* should not be vacated and set aside upon grounds in all respects like unto those above enumerated. Thereafter, upon consideration of the return made to the rule to show cause issued in said regard, the learned District Judge refused to quash the supoenas *duces tecum* last referred to and ordered the plaintiffs-in-error, Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, to comply with the terms of said subpoenas *duces tecum* by producing before a grand jury all of the books and papers described in said subpoenas on the 1st day of April, 1919, otherwise said Silverthorne Lumber Company, Inc., and Frederick W. Silverthorne, individually and as president of said Silverthorne Lumber Company, Inc., to show cause before court on April 1, 1919, why each of them should not be adjudged guilty of contempt of court and "be punished therefor as this Court may deem proper."

8. Thereupon, pursuant to said requirement to show cause, the Plaintiffs in Error above named made answer denying that said subpoenas *duces tecum* "had been duly served personally upon Frederick W. Silverthorne," and reiterated their objections above indicated to the validity of the subpoenas *duces tecum* in question, and further by way of answer supported by affidavit, set up that many of the books, papers and documents referred to in the schedules attached to said subpoenas *duces tecum* and therein and thereby indicated to be produced, had not been returned to the possession of the Silverthorne Lumber Company, Inc., or any of its officers, and your petitioner, Frederick W. Silverthorne, by way of further answer specifically denied that said subpoenas *duces tecum*, or any thereof, had been duly served upon him as stated in and by the Marshal's return endorsed thereon, and alleged the fact to be that on the 22d

day of March, 1919, a person purporting and representing himself to be a deputy United States Marshal had laid upon a desk before affiant what purported to be copies of the said six subpoenas *duces tecum* with schedules attached above referred to, but that said Deputy Marshal did not exhibit to affiant (defendant) the originals of said six subpoenas *duces tecum* or an original of any of them and did not state to the defendant contents of the six subpoenas *duces tecum* thereof.

9. Notwithstanding all of which, the learned District Court, upon consideration thereof and being advised as to the failure of the Silverthorne Lumber Company, Inc., and of your petitioner, Federick W. Silverthorne, to produce the papers and books mentioned in said of six subpoenas *duces tecum* before the grand jury as ordered to do, found and declared said plaintiff in error, Silverthorne Lumber Company, Inc., and your petitioner, Frederick W. Silverthorne, to be guilty "of contempt of this court in failing and refusing to comply with said six subpoenas *duces tecum*," and for failing and refusing to comply with the order of said District Court passed on the 28th day of March, 1919, with respect thereto, and ordered the plaintiff in error, Silverthorne Lumber Company, Inc., to be fined in the sum of $250 for such contempt and that your petitioner, Frederick W. Silverthorne, individually and as president of the said Silverthorne Lumber Company, be likewise adjudged guilty of contempt of court for failing and refusing to comply with said subpoenas *duces tecum* and the said order of the court and be "confined to the county jail of Erie County until he do comply with said subpoenas *duces tecum* or until he otherwise be purged of said contempt."

10. Pursuant to said order and since the date thereof, namely April 1, 1919, your petitioner has been and still is

incarcerated and confined in said county jail of Erie County, State of New York, and is deprived of his liberty contrary to the provisions of the Constitution of the United States in such case provided.

11. Thereafter, on said first day of April, 1919, said Silverthorne Lumber Company, Inc., and your petitioner, Frederick W. Silverthorne, applied for a writ of error from this honorable Court to review the judgment of the learned District Court for the Western District of New York, adjudging said Silverthorne Lumber Company, Inc., and your petitioner guilty of contempt and imposing the punishments above enumerated against each of them; and said petition for allowance of writ of error was duly granted and it was especially ordered that the same should "operate as a supersedeas and the clerk is hereby directed to stay the mandate of the District Court of the Western District of New York until further order of the said court," upon giving of bond with approved surety in the sum of $500 which said bond was duly given and approved as will fully appear upon inspection of the transcript of record now on file in this honorable Court in obedience to the writ of error aforesaid.

12. Notwithstanding the staying of the mandate and the superseding of the judgment of the learned District Court, adjudging said Silverthorne Lumber Company, Inc., and your petitioner to be in contempt of court and imposing punishment, which as above stated involved the incarceration in jail of your petitioner, said sentence to jail is being enforced as your petitioner is advised and believes, contrary to the law and right of the matter.

WHEREFORE, your petitioner prays that pending the consideration by this honorable Court of the questions raised for its adjudication by and under the writ of error issued herein and above referred to, he may be ordered en-

larged upon the giving of bail in such sum as to this honorable Court may seem to be proper.

Your petitioner will ever pray, etc., etc.

FREDERICK W. SILVERTHORNE,
By his Attorneys.
FREDERIC D. MCKENNEY,
MYER COHEN.

HENRY W. KILLEEN,
JAMES O. MOORE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION TO ENLARGE ON BAIL.

In view of the fact that there are pending at the present time against this petitioner at least two indictments with respect to which he has been arraigned and pleaded "not guilty" and has been enlarged upon bail in the sum of $7,500 in one case and $5,000 in the other, making a total of $12,500 in all, and further in view of the fact that the judgment of the District Court in the case at bar adjudging both Silverthorne Lumber Company, Inc., and the petitioner, Frederick W. Silverthorne to be in contempt of court has been, in theory at least, absolutely stayed by the granting of the writ of error and the perfecting of the same by the filing of a *supersedeas* bond on behalf of both of the abovenamed parties, it would seem to be but common right, not to mention justice, that the order of the learned trial judge holding petitioner guilty of contempt of court in refusing to produce the books, papers and documents in question, the right to compel the production of which is the very question underlying the pending writ of error herein, should have been likewise superseded or suspended and the petitioner relieved from incarceration upon the giving bail in such sum as demanded, if indeed any further bail, in addition to the above mentioned, reasonably should have been required.

If, as is expressly provided in and by paragraph 2 of Rule 36 of the Rules of Practice of this Honorable Court, an accused person although convicted of an infamous crime may be enlarged upon bail after citation served, pending the disposition of an appeal or writ of error from a District Court of the United States to this Honorable Court, it would seem by analogy that

in a case involving no moral turpitude but merely a firm assertion on the part of a citizen of rights confidently believed to be guaranteed to him by the provisions of the Constitution of the United States, pending the determination by this Court on a writ of error which has stayed in the greater part the operative effect of the judgment complained of, the accused should likewise be admitted to bail in such amount as may be fixed.

By the Act of October 15, 1914, Chap. 323, Sec. 21, *et seq.* (38 Stats., 738) it is expressly provided that in the case of one charged with the disobedience of "any lawful right, process, order," etc., of a Federal Court by reason of having done "any act or thing therein or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States," etc., the accused shall be proceeded against for his "said contempt," and in the case of conviction and the granting of a writ of error to review such conviction the "execution of judgment *shall be* stayed, and the accused if thereby sentenced to imprisonment, *shall be* admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any District Court of the United States or any court of the District of Columbia." By reason of the limiting provisions of Sec. 24 of said Act of Congress, the provisions above referred to are not truly and technically applicable to the case at bar by reason of the fact that the thing of which the petitioner, Frederick W. Silverthorne is charged, while adjudged to constitute a contempt, is not a thing "of such character as to constitute also a criminal offense under any statute of the United States" or the laws of any State.

If, however, it be the policy of the law to admit to bail in cases of conviction for contempt of court where the thing done constituting the contempt also constitutes a criminal offense against the United States or the laws of other States, how much the more compelling is the petition to admit to bail in cases where, as here, the thing done does not and can not constitute a criminal offense under any law and at most but constitutes a *bona fide* attempt to assert and maintain rights supposedly guaranteed by the fundamental law of the land!

As was said by Mr. Justice Lurton, lately an Associate Justice of this Honorable Court, when sitting as Circuit Judge in the case of *McKnight v. U. S.*, 113 Fed., Rep., 451:

> "The granting of the writ of error in itself stays the execution of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and the policy of the statute of the United States."

In view of the fact that the judgment of the District Court for the Western District has been stayed by the granting of the writ of error and the acceptance and approval of a *supersedeas* bond given in accordance with the requirements of the court, and in view of the further fact that the validity of the finding by the learned District Court that the petitioner here had been and was guilty of contempt of the court in failing to obey the subpoenas in question, is inextricably interwoven with the question of right and power on the part of the Court to compel the production of the books, papers

and documents of the Silverthorne Lumber Company, Inc., which is the entire question for review under the writ of error in question, we respectfully submit that pending the disposition of the primary question, the petitioner should be enlarged upon the giving of bond for appearance in such sum as this Honorable Court may deem reasonable and proper.

Respectfully submitted,
FREDERIC D. MCKENNEY,
MYER COHEN,
Attorneys for Frederick W. Silverthorne, Petitioner.

HENRY W. KILLEEN,
JAMES O. MOORE,
Of Counsel.

To the Honorable The Solicitor General of the United States, Department of Justice:

Sir:

Please take notice that the foregoing petition of Frederick W. Silverthorne to be enlarged on bail and the foregoing brief in support thereof will be submitted to the Supreme Court of the United States on Monday next, May 5, 1919, at 12 o'clock noon, or so soon thereafter as counsel may be heard.

Respectfully,
FREDERIC D. MCKENNEY,
MYER COHEN.
Attorneys for Petitioner.

Copy of foregoing petition, brief in support thereof and notice acknowledged this 3d day of May, A. D. 1919.

ALEX. C. KING,
Solicitor General.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

SILVERTHORNE LUMBER CO., INC., AND Frederick W. Silverthorne, individually and as President of the Silverthorne Lumber Co., Inc., Plaintiffs in Error, *v.* THE UNITED STATES OF AMERICA. } No. 996.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

MEMORANDUM IN OPPOSITION TO PETITION OF FREDERICK W. SILVERTHORNE TO BE ENLARGED ON BAIL.

I.

The order of the District Court allowing a writ of error did not grant a supersedeas as to the judgment against Frederick W. Silverthorne.

The order of the District Court allowing a writ of error was conditioned upon the furnishing by the Silverthorne Lumber Co., Inc., of a bond in the sum of $500, and the order provided "that said writ of error and bond, when furnished, shall operate as a *supersedeas.*"

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While there was a joint application and a joint order the judgments were entirely different in kind and separable, and the obvious purpose and effect of the order was to grant a *supersedeas* in the case of the corporation and not in the case of the individual.

This is further indicated by the fact that the order when presented to the court by counsel for plaintiffs in error provided for the furnishing of bond by both parties, and was altered by the judge at the time of signing so as to provide for the furnishing of a bond by the corporation alone.

Finally, treating the order as superseding the judgment as to Silverthorne would lead to this result: Petitioner having been committed under the judgment of contempt, and there being no antecedent process, he is now being held in custody without warrant of law. It can not be presumed that the District Court intended any such absurd result.

II.

The refusal of the District Court to grant a supersedeas or to admit petitioner to bail did not infringe any statutory or constitutional right.

There is no statute of the United States which provides that a writ of error to review a judgment of contempt committed *in facie curiae* shall operate as a *supersedeas*. At common law every court of record was the sole judge of contempts against its authority, and the judgments of such courts in cases of contempt were not reviewable. Many jurisdictions to-day deny the right of review, either by error or

appeal, on the ground of the discretionary power of the court to punish contempts of its authority. *Rapalje on Contempt*, Sections 141, 149, 151.

Of course, the remedy by *habeas corpus*, where the jurisdiction of the court is attacked, is clear.

In jurisdictions recognizing the right of review in such cases it is not the practice either to grant a *supersedeas* or to admit to bail. *Matter of Percy*, 2 Daly (N. Y.) 530; *Lott* v. *Burrel*, Mills S. C. Const. Rep., 616; 13 *Corpus Juris*, 73; *Rapalje on Contempt*, Sec. 148. In the last mentioned work it is said:

> Where a contempt is committed *in facie curiae*, and the offender is committed to prison *instanter*, or a fine is imposed with the requirement of instant payment, such sentence would have to be executed; no appeal would supersede it.

Nor has the petitioner any constitutional right to a *supersedeas* or bail. A person convicted of a direct contempt is in all essential particulars comparable with a person convicted of crime, and it is well settled that a person convicted of crime has no constitutional right to bail pending a review of his conviction. This for the reason that such a person has no constitutional right of review, and that right when conferred by statute may be granted upon such conditions as the sovereign may see fit to impose. *McKane* v. *Durston*, 153 U. S. 684.

As stated by District Judge Jones in *Ex parte Harlan*, 180 Fed. 119, 135:

> It is needless to say that there is no constitutional right to bail in any case after

> conviction. After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the Government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress.

The provisions of the so-called Clayton Act, 38 Stat. 738, cited in the petition of the plaintiff in error, do not indicate a purpose on the part of Congress that a person convicted of direct contempt shall be enlarged on bail pending a review of his conviction. Plaintiff in error admits that the present case does not come within the terms of that statute, and the following provision plainly shows that Congress did not intend that it should affect any case not coming within its terms:

> Nothing herein contained shall be construed to relate to contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this act, may be punished in conformity to the usages at law and in equity now prevailing. Comp. Stat., Sec. 1245d.

III.

The District Court did not abuse its discretion in refusing to grant a supersedeas or to admit to bail, for the reason that plaintiff in error is in direct and continuing contempt.

Plaintiff in error, Frederick W. Silverthorne, was committed for failing and refusing to comply with six several subpœnas *duces tecum* calling for designated books, papers, and documents of the Silverthorne Lumber Company, of which he is president. The subpœnas were limited by description and by dates and were no more sweeping than those sustained by this court in *Wheeler* v. *United States*, 226 U. S. 478; *Wilson* v. *United States*, 221 U. S. 361; and *Dreier* v. *United States*, 221 U. S. 394.

The only reason assigned by plaintiff in error for his refusal was that he "did not intend to incriminate the corporation." That this is not a sufficient justification is settled by *Hale* v. *Henkel*, 201 U. S. 43, and the *Wilson* and *Dreier* cases, *supra*.

Plaintiff in error stands, therefore, in direct and continuing contempt of court. The case is wholly unlike that of a civil or constructive contempt, where the offense once committed is complete. Each day's contumacy is in effect a new contempt. It is respectfully insisted, therefore, that there exists no reason for admitting plaintiff in error to bail.

In this connection it should be noted that the action of the District Court in refusing to admit plaintiff in error to bail was based on personal observation of his demeanor at the bar and with full opportunity to

judge of the *bona fides* of his objections, and there is no suggestion in the record that the court acted hastily or with passion.

IV.

The present petition should be considered in connection with the Government's motion to dismiss heretofore filed in this court and now pending submission.

The United States on May 5 served on counsel for plaintiffs in error a copy of a motion to dismiss the writ of error herein, with notice that the same would be presented to this court on May 26. On May 5 printed copies of the motion were filed with the court, together with the acknowledgment of service. The motion asks that the writ of error be dismissed on the ground that there is no merit in the questions presented and that they have been foreclosed by the prior decisions of this court.

While the Government may not be entitled to hearing on the motion as an original motion until May 26, inasmuch as plaintiff in error by his petition has invoked the jurisdiction of the court under the writ of error, and has thereby necessarily raised the question of the jurisdiction of the court to entertain said writ, it is respectfully submitted that the court should consider whether the questions presented are sufficiently substantial to confer such jurisdiction, and if not that the court should dismiss the writ.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

SILVERTHORNE LUMBER CO., INC., AND Frederick W. Silverthorne, Individually and as President of the Silverthorne Lumber Co., Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA.

No. 996.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT.

Comes now the Solicitor General on behalf of the United States and moves the Court to dismiss the writ of error herein.

STATEMENT.

The said writ of error is taken to a judgment of the District Court of the United States for the Western District of New York, entered on April 1, 1919, adjudging the Silverthorne Lumber Co., Inc., and Frederick W. Silverthorne, its president, in contempt in failing and refusing to comply with the directions of six several subpœnas *duces tecum* named in the peti-

tion in said case and for failure to produce before the grand jury of said court the books, papers, and documents of the Silverthorne Lumber Company and directing that the said Frederick W. Silverthorne be committed to jail until he should produce the said books, papers, and documents or be otherwise purged of said contempt.

It appears that on February 25, 1919, Asa K. Silverthorne, J. W. McConkey, and Frederick W. Silverthorne were arrested under United States Commissioner's warrants charging a conspiracy under section 37 of the Criminal Code. A grand jury was in session and subpœnas *duces tecum* were issued and served upon the treasurer of the company by two deputy marshals. These subpœnas called for the production of all books and papers relating to movements of cars and shipments from the yards of said company without specification. A large number of such books and papers were produced and a number of them were photographed. Thereafter, upon an application for the return of the papers charging an illegal search and seizure, the court determined that the subpœnas were too sweeping in character and directed that the papers be returned to the corporation. A petition by the United States Attorney that the originals be impounded with the clerk of the court was denied, but the court ordered that the photographs be impounded.

Thereafter an indictment was found against Asa K. Silverthorne, Frederick W. Silverthorne, J. W. McConkey, and Egbert E. Woodworth for a conspiracy

to defraud the Government with reference to certain shipments of lumber over the Lehigh Valley Railroad.

After the books and papers of the corporation had been returned under the court's order a new grand jury was considering further conspiracies to defraud the United States on further shipments, and six subpœnas *duces tecum* directed to the corporation were served on Frederick W. Silverthorne, its president, and Henry W. Killeen, its attorney, to produce the books of the corporation. These subpœnas specified the particular books and papers called for, naming them, and limited them also as to time, to wit, from January 1, 1918, to March 1, 1919. The corporation procured a rule to show cause why such subpœnas should not be quashed, the petition being based chiefly upon the grounds that the corporation could not be compelled to incriminate itself and that the Government had gained its knowledge thereof illegally by an unreasonable search and seizure on February 25, 1919. The court denied the rule and ordered the corporation, its president, and its attorney to comply with the subpœnas. The subpœnas were not complied with, and a rule for contempt was issued against the Silverthorne Lumber Company, Inc., Frederick W. Silverthorne and Henry W. Killeen. Killeen answered that he had parted with possession of the books, but Silverthorne appeared and refused to comply, on the stated ground that he would not incriminate the corporation. On April 1, 1919, the court adjudged him and the corporation

in contempt, fining the corporation $250.00 and ordering Silverthorne committed in the Erie County Jail until purged of the contempt, where he has since been confined. The rule was denied as to Killeen.

The court below granted a supersedeas upon the corporation giving a bond of $500.00 conditioned according to law.

ASSIGNMENTS OF ERROR.

The assignments of error present the following points:

1. That the subpœnas in question, issued on March 21, 1919, had been issued upon information derived by the United States Attorney from an unreasonable search and seizure of papers of said corporation on February 25, 1919, which had been so held by the court and the original books and papers required to be returned, but of which photostat copies and excerpts had been made which were permitted by the court to be retained, in violation of the Fourth Amendment to the Constitution (Assignments Nos. 1 and 2).

2. That the six subpœnas taken as one subpœna would require the production of all the books and papers of the corporation and that this would be an unreasonable search and seizure (Assignments Nos. 3, 4, 5).

3. That said books and papers would tend to incriminate said Silverthorne Lumber Co., Inc., and such production would constitute a violation of the Fifth Amendment (Assignments Nos. 6 and 7).

4. That the action of the court in adjudging defendants in contempt denies the Silverthorne Lumber Co., Inc., the equal protection of the law in violation of the Fourteenth Amendment (Assignment No. 8).

5. That the subpœnas require the production of the private books, etc., of Asa K. Silverthorne, and that the court failed to determine which of said books, papers, and documents belong to said Asa K. Silverthorne personally and to excuse their production (Assignment No. 9).

6. That Frederick W. Silverthorne was not legally personally served with the subpœnas in question or with any of them (Assignment No. 10).

BRIEF.

It is respectfully insisted that the assignments of error urged present no material question, but that the questions raised have been foreclosed by the decisions of this court.

1. That information may have been obtained by the seizure of the books and papers subsequently declared illegal could not prevent such information from being used by the United States Attorney in order to prepare and have issued proper subpœnas *duces tecum*. *Adams* v. *New York*, 192 U. S. 585.

In the *Adams* case the defendant was indicted and tried for, and convicted of, having gambling paraphernalia in his possession, in violation of a New York statute. Papers found in the execution of a search warrant prior to his indictment and not

mentioned therein were seized. Their introduction in evidence at the trial was objected to because it violated defendant's right under the Fourth Amendment to be secure in his person, papers, and effects against unreasonable searches and seizure. Both the Court of Appeals of New York (176 N. Y. 351) and this Court held that there had been no violation of this constitutional restriction.

Finding that the subpœnas for the production of books, papers, and documents in the instant case were too sweeping, the court ordered the books, etc., returned. The subpœnas subsequently issued were less inclusive so as to bring them expressly within the decision of this Court in the case of *Hale* v. *Henkel*, 201 U. S. 43, 76, 77, and to make certain that defendants' rights should not be violated. Plaintiff in error Silverthorne is contumacious and refuses to obey a lawful order or process of the court.

2. The proposition of the plaintiffs in error that the six subpœnas would require the production of all of the corporation's books and papers relating to its business and deprive them of their rights under the Fourth Amendment is not well taken. It is within the power of the court to direct the issuance of subpœnas for all such books, papers, and documents as are claimed to be material in a matter being investigated by a grand jury in an effort to ascertain the extent of the transgression of the law in any case. In these subpœnas the specification was made of the particular books and papers and also a limit as to date, January 1, 1918, to March 1, 1919.

In the case of *Wheeler* v. *United States*, 226 U. S. 478, 482, 483, the subpœna *duces tecum* summoned the corporation to appear before the grand jury and produce

> *all* the cash books, ledgers, journals and other books of account of the company, and all copies of letters and telegrams of [the corporation] * * * for and covering the period from October 1, 1909, to January 1, 1911.

The validity of the process was sustained.

3. That the books of the corporation might have tended to incriminate it was no reason why they should not be produced, as a corporation is not entitled to the constitutional protection against self-incrimination. *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361, 377.

It appears that plaintiff in error Frederick W. Silverthorne, president of the company, bases his refusal to produce the books, papers, and documents in question on the ground that they would *tend to incriminate the company*. No claim of personal privilege is asserted. In the first place the claim or privilege must be personal to the witness, and in the second place the constitutional protection against self-incrimination is not applicable to a corporation. The cases of *Hale* v. *Henkel* and *Wilson* v. *United States*, above cited, dispose of the matter and positively foreclose any further contention on the subject.

In the former case Mr. Justice Brown, speaking for the court, said (201 U. S. 43, 69):

> * * * The right of a person under the Fifth Amendment to refuse to incriminate

himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. * * * The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.

Again (pp. 74, 75):

If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.

> * * * The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

The case of *Wilson* v. *United States*, *supra*, is to the same effect. There, as here, the books belonged to a corporation of which the appellant (Wilson) was president, and were required to be produced by a subpœna *duces tecum*.

This court said (p. 382):

> * * * It [the corporation] cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.
>
> This view, and the reasons which support it, have so recently been stated by this court in

> the case of *Hale* v. *Henkel, supra,* that it is unnecessary to do more than to refer to what was there said [quoting at length, pp. 74, 75].

Nor would the claim of personal privilege advantage plaintiff in error Frederick W. Silverthorne. Such a claim of personal privilege was made by the appellant in the *Wilson* case and was denied. There the books sought to be produced, it was alleged, contained copies of his personal correspondence, but even that did not affect the situation, the court saying (p. 378):

> * * * But his personal letters were not demanded; these the subpœna did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them.

The principal books, etc., are not claimed to be out of the power of the plaintiff in error. Again, there was no offer to produce the books of the corporation called for, or any of them.

4. The contention that the action of the court in adjudging plaintiffs in error in contempt denies the corporation the equal protection of the law, in violation of the Fourteenth Amendment, is without any specification and is without merit.

5. Assignment of error No. 9, to the effect that the court erred in requiring the production of the private books, papers and documents of Asa K. Silverthorne and in failing to set forth those belonging to him

personally and to excuse their production, is inconsequent. Plaintiff in error refused to produce the corporation books in his possession on the ground that he could not incriminate it and was committed for this contempt.

6. Assignment of error No. 10, to wit, that plaintiff in error Frederick W. Silverthorne was not legally served with the subpœnas or any of them, is likewise without merit. In his answer in response to the rule to show cause plaintiff in error denies due personal service, yet admits in his affidavit in support of the answer that subpœnas addressed to the Silverthorne company were handed to him and that he and the company's attorney, Mr. Killeen, "looked at them." Further, there is an implied admission of service in his affidavit in support of the corporation's answer with reference to certain books which he says are demanded by the subpœnas.

The points made under the last two assignments of error (Nos. 9 and 10) also raise no Federal question which gives this Court jurisdiction and will not be considered unless one of the other assignments of error presents a substantial constitutional question. *Sugarman* v. *United States*, No. 345, October Term, 1918, decided March 3, 1919.

It is apparent that there is no merit in the questions presented and that they have been foreclosed by prior decisions of this Court. The writ should therfore be dismissed. *Frolan* v. *United States*, 236 U. S. 216.

In the alternative, an affirmance of the judgment is suggested, for the reasons that the questions involved have heretofore been ruled adversely, and the writ of error has been taken manifestly for delay. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308.

ALEX. C. KING,
Solicitor General.

MAY, 1919.

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In the Supreme Court of the United States

OCTOBER TERM, 1918.

SILVERTHORNE LUMBER COMPANY (INC.) and Frederick W. Silverthorne, individually and as president of the Silverthorne Lumber Company (Inc.), plaintiffs in error,

v.

THE UNITED STATES OF AMERICA.

No. 996.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

ADDITIONAL BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

At the time of submitting the above-stated motion the United States desires to reply briefly to certain statements of fact and propositions of law contained in the brief for plaintiffs in error in opposition to the motion to dismiss or affirm.

I.

As to the alleged "raid" of the offices of the Silverthorne Lumber Company (Inc.), on February 25, 1919, by certain deputy marshals and other Government officers.

Although wholly *dehors* the issue, a considerable portion of the brief of plaintiffs in error is devoted to charges concerning the manner in which they allege

the first subpoena *duces tecum* was served. The proceeding is variously branded as "an unlawful raid," "an unreasonable search and seizure," "a high-handed and lawless raid in force," and "an outrage."

According to said brief, a large number of Government officers descended upon the offices of the company while its officers were under arrest, handed to one Walter H. Tobey, an "employee" of the company, a copy of a subpœna, placed said "employee" under restraint, and proceeded forthwith to search and ransack the offices.

The more serious charges are to the effect that said officers broke open a drawer of the safe and took therefrom many valuable private papers, some of which have not been returned. It is stated that while prior to this so-called raid there were $30,000 of Liberty bonds and $25,000 of certificates of indebtedness of the United States in said safe, "after the raid these had disappeared!" (Br. p. 3.)

Without abating insistence that this matter is irrelevant, we deem it our duty to point out the striking inconsistencies between the version contained in said brief and that contained in the transcript of record.

The record shows the following:

The affidavit of Tobey, styled in said brief a mere "employee" of the Silverthorne Company, shows he is the vice president and treasurer thereof and that service of the subpœna was made by reading it to

him. He does not allege that he at any time protested against the action of the officers. He goes no further than to state that said officers proceeded without his acquiescence or consent. As to his being put under restraint, he said that "one so-called official stayed with me in the room where I was, and I was not permitted to go anywhere unless this man accompanied me." (Trans. 39–43.)

Anthony W. Brick, secretary of the Silverthorne Company, was present at the time and made affidavit to the effect that he made no protest against the action of the officers. (Trans. 53; 68–69.) In like manner John S. Munro, employed in the office of said company as clerk and stenographer, made affidavit to the effect that he was present at the time and assisted Messrs. Tobey and Brick to collect the data called for in the subpoena. He further stated that no locks were forced in desks or safes. (Trans. 54.)

Thomas E. Moran, deputy United States marshal, testified that he served the subpoena by reading it to Tobey. He further testified that Tobey remarked that he did not know just what papers were wanted, and that thereupon he (Moran) introduced a Mr. Snyder, of the Railroad Administration, with the statement that he would be able to assist. Moran then went out into the yard to serve other employees, and when he returned the papers had been gathered together and were being carried to the automobile. (Trans. 48–50.)

William P. Waters, designated as guard to accompany the marshal in serving the subpoena, states that when he arrived on the scene the subpoena had been served. He states that both Tobey and Brick were present, and that neither made any objection whatever to the carrying off of the papers. He states that he observed all papers taken from the safe and that there were no Liberty bonds or certificates of indebtedness among them. He further states that "no locks or drawers whatever were broken into or pried open." (Trans. 51–52.)

Stephen T. Lockwood, United States attorney for the Western District of New York, into whose possession the various papers came, made affidavit to the effect that he received no Liberty bonds or certificates of indebtedness. Annexed to his affidavit is a list of all the papers and documents received by him. (Trans. 45–48.)

After these charges had been made the United States District Court of the Western District of New York directed that an investigation be conducted before George P. Keating, master in chancery. At a hearing held on May 10, 1919, counsel for the Silverthorne Lumber Company (Inc.), stated that he was unwilling to proceed. Accordingly, with the consent of the company's counsel, the master dismissed the proceeding.

The facts, therefore, are otherwise than as claimed in said brief.

The irrelevancy of the matter results from the fact that the said subpœna served on February 25,

1919, has by order of court been since vacated and set aside. (Trans. 70–73). According to the affidavit of Carl B. Sherman, assistant United States attorney, all papers and documents furnished under said subpœna have been returned to plaintiffs in error. (Trans. 133–134.)

The effect of the position of the plaintiff in error is that although the last series of subpœnas call for the production of papers which the defendant corporation is not privileged to decline to produce, if the information upon which such subpœnas are based has been acquired by the use of other subpœnas which have been quashed as too indefinite or otherwise illegal, the Government is estopped from requiring the production of the testimony by regular and sufficient subpœnas.

II.

As to the manner in which the last series of subpoenas were served on the Silverthorne Lumber Company (Inc.).

It is now contended that the last series of subpœnas, for failure to obey which plaintiffs in error were adjudged in contempt, were not legally served for the reason that the deputy marshal did not read the subpœnas to plaintiff in error, Silverthorne, but merely placed copies thereof on the desk before him.

In this connection it appears from an affidavit by Silverthorne (Trans. 202–203) that he was slightly acquainted with the deputy marshal who served the subpœnas. He states that the marshal said: "I am

glad to find you. I have spent $3 trying to find you." He further states that the marshal placed copies of the subpœnas before him, and that he looked at them after the marshal had departed from the room. He does not aver that he made any objection to the sufficiency of service or asked to see the originals.

Henry W. Killeen, counsel for plaintiffs in error, made affidavit to the effect that the service of the subpœnas took place in his office; that he had Mr. Silverthorne present for the express purpose of being served, and that service was made either by handing copies to Silverthorne or by placing them on the table before him. (Trans. 207–211.)

From these affidavits it is clear the service was made in accordance with a prearranged plan between Mr. Killeen and the marshal; that Silverthorne was fully apprised of the nature and purpose of the proceeding, and that under the circumstances it would have been a useless formality for the marshal to read the subpœnas. Copies of the subpœnas, with the marshal's return of service, may be found in the transcript at pages 237–255.

But even if the service could be said to be defective, the defect was cured by the action of the corporation in coming into court and moving that the subpœnas be quashed on other grounds than want of proper service. (Trans. 147–163.)

It was only after this motion had been overruled and obedience to the subpœna ordered that the claim of want of sufficient service was made.

III.

The contention that the question presented has never been directly passed on by this court is unsound.

As stated in the motion to dismiss or affirm, the only reason assigned by Silverthorne for his failure to comply with the subpœnas *duces tecum* was that he did not intend to incriminate the corporation. (Trans. 215–217.)

The right of an officer of a corporation to refuse to produce the books and papers of the company on this ground, it is asserted, has never been directly passed on by this court, and an attempt is made to distinguish the cases of *Hale* v. *Henkel* (201 U. S. 43) and *Wilson* v. *United States* (221 U. S. 361), cited in the motion.

It is true that in *Hale* v. *Henkel* the witness did not refuse to produce the books and papers on the ground that they would incriminate the corporation (p. 46). But this objection was urged upon this court by counsel, who relied on the common-law authorities cited in the brief for plaintiffs in error (p. 50–51). The issue being thus squarely raised, this court, in one of the most deliberate decisions on record, held that an officer of a corporation which is charged with a criminal violation of the laws of the United States can not refuse to produce the books of the corporation on the ground that they will incriminate it, for the reason that the immunities of the fifth amendment extend only to a natural and not to an artificial person.

That this point was directly decided in *Hale* v. *Henkel* is no longer open to question. See *American Tobacco Co.* v. *Werckmeister* (207 U. S. 284, 302); *Hammond Packing Co.* v. *Arkansas* (212 U. S. 322, 348–349); *Wilson* v. *United States* (221 U. S. 36, 382–386); *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission* (221 U. S. 612, 622); *Wheeler* v. *United States* (226 U. S. 478, 489–490); *United States* v. *American Tobacco Co.* (146 Fed. 557); *In re American Sugar Refining Co.* (178 Fed. 109); *Orvig Dampskibselskap Actieselskabet* v. *New York & Bermudez Co.* (229 Fed. 293).

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission* (221 U. S. 612), involved the validity of an order of the Interstate Commerce Commission, made under the provisions of the Act to Regulate Commerce, requiring carriers to make reports regarding the hours of labor of employees subject to the Hours of Service Act (34 Stat. 145). Here was an order directed to the corporation itself requiring it to furnish information which would subject it to fines and penalties. The order was resisted by the corporation on the ground that it would compel it to be a witness against itself in violation of the fifth amendment. This court disposed of the objection as follows:

> Nor can the corporation plead a privilege against self-crimination under the fifth amendment. (*Hale* v. *Henkel*, 201 U. S. 74, 75; *Hammond Packing Company* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361.)

IV.

The contention that the United States can not compel the production of books and papers by the Silverthorne Company for the reason that it is not exercising a Federal franchise, is not well taken.

An effort is made to distinguish *Hale* v. *Henkel* on the ground that the United States has greater power over a corporation when investigating alleged violations of statutes based on the interstate commerce power than it has when investigating alleged violations of other statutes. The basis of this attempted distinction is that a corporation engaged in interstate commerce exercises a Federal franchise and is therefore subject to the visitatorial power of the United States.

The Constitution of the United States confers no right to engage in interstate commerce. That power is derived by a corporation from its charter. Nor is any franchise granted under the Sherman Act or the Act to Regulate Commerce. These acts confer no rights. They merely regulate and restrain the exercise of corporate power. It is submitted, therefore, that the United States possesses the same power when investigating alleged violations of statutes designed to prevent fraud as when investigating alleged violations of penal statutes enacted under the interstate commerce clause.

Certainly the United States has as much power over a corporation to investigate alleged violations of its laws as a State possesses over a corporation of an-

other State doing business within its borders. Compare *Consolidated Rendering Co.* v. *Vermont* (207 U. S. 541) and *Hammond Packing Company* v. *Arkansas* (212 U. S. 322).

ALEX. C. KING,
Solicitor General.

MAY, 1919.

○

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Supreme Court of the United States.

OCTOBER TERM, 1918—No. [redacted]358

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,

Plaintiffs-in-error,

v.

UNITED STATES OF AMERICA,

Defendant-in-error.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION OF DEFENDANT-IN-ERROR TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
FREDERIC D. MCKENNEY,
MYER COHEN,
HENRY W. KILLEEN,
JAMES O. MOORE,
Of counsel for plaintiffs-in-error.

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Supreme Court of the United States.

OCTOBER TERM, 1918—NO. 996.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,

Plaintiffs-in-error,

v.

THE UNITED STATES OF AMERICA,

Defendant-in-error.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION OF DEFENDANT-IN-ERROR TO DISMISS OR AFFIRM.

The United States as defendant-in-error having moved to dismiss the writ of error upon the ground that the questions raised have been foreclosed by the decisions of this court (brief, p. 5), the following memorandum is submitted in opposition.

STATEMENT.*

The plaintiff-in-error the Silverthorne Lumber Company, Inc., is a New York corporation engaged in the business of buying and selling lumber at North Tonawanda, New York. The plaintiff-in-error, Frederick W. Silverthorne, is its president, and his father, Asa K. Silverthorne, is its general manager. Both of them live

*This memorandum had to be written before the record was printed, and therefore it was impracticable to make page or folio references.

in Buffalo, about twelve miles from the office of the Lumber Company. At about 7:30 o'clock in the morning of February 25, 1919, each of them was arrested at his home in Buffalo under a warrant charging him with conspiring with others to defraud the United States, and taken to the office of the federal marshal and detained there for several hours, when both were released upon bail.

In the meanwhile and at about a quarter of ten o'clock, while the president and general manager of the Lumber Company were both still under detention by the federal authorities at Buffalo, waiting to be taken before a commissioner to be released on bail, *six* or *seven* deputy marshals and railroad agents entered the office of the Lumber Company in North Tonawanda, handed an employé of the company, Walter H. Tobey, a copy of a single subpœna *duces tecum* calling for the production of *all* the books, papers and documents of the company for a period of about five years, and then, without any search warrant or other lawful process whatever, immediately placed the employé Tobey under restraint and proceeded to search and ransack the office, even breaking open one of the drawers in the safe, and finally seized and carried away with them all the books, papers and documents found there. The documents thus seized and carried off included over forty policies of insurance, several packages of receipts for premiums, the will of Mrs. Silverthorne (the mother of the plaintiff-in-error), the private papers of employés, promissory notes, releases, checks, private correspondence of third parties and other documents, all now conceded to have no bearing on the cause (see schedule C to answering affidavit of Lock-

wood). Prior to the raid there were $30,000 of Liberty Bonds and $25,000 of United States certificates of indebtedness in the safe of the Lumber Company; after the raid these had disappeared! The members of the raiding party swear that they did not carry off these bonds and certificates; but the fact of their disappearance at the time of the raid is indisputable.

The deputy marshals delivered the seized documents to the United States Attorney the same morning, and he at once presented them to the grand jury then sitting, which thereafter and on March 10, 1919, returned indictments against the Lumber Company, Frederick W. Silverthorne, Asa K. Silverthorne and others, charging them with conspiring to defraud the United States by falsely invoicing grain door boards, which had theretofore been sold to the Lehigh Valley Railroad Company while under federal control, at a greater number of feet than were actually delivered.

Immediately after this wrongful raid and seizure on February 25th, application was made by the Lumber Company for the return of the books, papers and documents thus seized and removed from its office, and on March 6th, that is, nine days after the search and seizure, the District Court granted the motion, its order reciting that "it satisfactorily appears to the court that the books, papers, memoranda, property and effects were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpœna *duces tecum*, in violation of the constitutional rights and privileges of the petitioner." The United States Attorney, however, returned only a part of the papers, books and

documents seized and removed on February 25th, and, although a petition filed by him praying for the impounding of the seized papers was denied, nevertheless photographs and copies he had made of them were permitted by the District Court to be impounded and are now in the possession of the clerk of the court.

Two days after the District Court had ordered the return of the seized books and papers, and on March 8, 1919, the United States Attorney caused six subpœnas *duces tecum* directed to the Lumber Company to be served upon its employé Tobey. These subpœnas collectively called upon the company to produce all the books, papers and documents which had been illegally seized and whose return had but two days before been directed by the court. The Lumber Company at once moved to quash the subpœnas, and thereupon, after argument, the United States Attorney withdrew them.

On March 21st, however, the United States Attorney again caused six subpœnas *duces tecum*, in substantially the same form as those theretofore withdrawn by him, to be issued, directed to the Lumber Company and requiring it to produce before the grand jury certain books, papers and documents. These subpœnas collectively required the production of practically all of the company's books, papers and documents, including all those seized on February 25th preceding except insurance policies, receipts, etc., some of which had never even been returned to the company, and of some of which copies and photostats had been impounded by the court.

The six last mentioned subpœnas were served on one

of the counsel for the plaintiffs-in-error, Mr. Killeen. An attempt was made to serve them upon the plaintiff-in-error, Frederick W. Silverthorne, but it is contended that the attempted service was a nullity. The deputy marshal merely left in front of Mr. Silverthorne a package consisting of six copies of the subpœnas; he did not exhibit the original subpœnas at all, and he did not make the slightest effort to communicate the contents of the papers to Mr. Silverthorne.

The Lumber Company immediately petitioned the court to vacate the subpœnas upon various grounds, the principal of which may be summarized as follows:

(1) That, as the books, papers and documents called for in the subpœnas had been unlawfully seized by government officers, examined and photographed, advantage of the unlawful raid and seizure could not thereafter be obtained by compelling the production of such books, papers and documents, and that compulsory production would in substance and effect nullify the company's rights under the Fourth Amendment to the Constitution of the United States;

(2) That, although limited as to time, the six subpœnas *duces tecum* collectively were still unreasonable and illegal in that they required the production of practically all of the company's books, papers and documents pertaining to its business, and thus constituted an unreasonable search and seizure in violation of the terms of the Fourth Amendment to the Constitution, and

(3) That the compulsory production of the Lumber Company's books, papers and documents would tend to

incriminate it in violation of its rights under the Fifth Amendment to the Constitution.

Thereafter the court made an order denying the Lumber Company's application to set aside the subpœnas. This order was served on its counsel, but never served on the plaintiff-in-error, Frederick W. Silverthorne.

On March 28, 1919, the United States Attorney procured from the court a rule requiring the plaintiffs-in-error to show cause why they should not comply with the subpœnas *duces tecum* or be punished for contempt. In response thereto the Lumber Company filed a separate answer setting forth in detail the foregoing facts, re-specifying its aforesaid objections to the compulsory production of its books, papers and documents, and asserting its constitutional rights, privileges and immunities under the Fourth and Fifth Amendments to the Constitution. The plaintiff-in-error, Frederick W. Silverthorne, also filed a separate answer averring that he had not been legally served with the subpœnas and stating the circumstances in that regard, which have already been mentioned.

In their respective separate answers and by their counsel in court, each of the plaintiffs-in-error, acting under the advice of counsel and in good faith, refused to produce the books, papers and documents required by the subpœnas. The court thereupon adjudged them to be in contempt. In order to procure a review of this judgment by this court, in the respects above indicated, the plaintiffs-in-error sued out the writ of error which the United States now moves to dismiss upon the claim that the

questions raised thereby are unsubstantial and frivolous and are foreclosed by prior decisions of the court.

The contempt in the case at bar was rendered necessary by the procedure adopted by the government officials, and has in it no element of contumacy. It was under the advice of counsel for the purpose of having determined promptly and before the jeopardy and expense of a trial the grave constitutional questions involved.

The jurisdiction of this court is thus invoked to review a final judgment of contempt involving the determination of questions arising under the Constitution of the United States, and the procedure pursued towards that end is that prescribed by this court in *Alexander* v. *United States*, 201 U. S. 117, 121-2, and *Nelson* v. *United States*, *id.* 92, 98.

The plaintiffs-in-error now seek to obtain a hearing and decision upon the following questions, which it is insisted have not been decided adversely to them by this court and are not foreclosed by any prior decision thereof, viz.:

I. Whether prosecuting officials of the United States can, after having wrongfully raided the private offices of an individual or corporation in order to obtain knowledge and discovery of private papers through illegal search and seizure in violation of the constitutional rights of the person subjected to such search and seizure, nevertheless consummate and secure the full benefit of their wrong by subsequently compelling the production under a subpœna *duces tecum* of the papers thus found and seized.

II. Whether the subpœnas *duces tecum* herein in question do not collectively constitute an unreasonable search and seizure within the prohibition of the Fourth Amendment to the Constitution of the United States in view of their sweeping character and scope.

III. Whether a private state trading corporation when itself subpœnaed to produce its own private records in a criminal case directed against it, involving no federal right or franchise whatever, is entitled to plead the immunity from self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States.

IV. Whether any person can be lawfully punished and imprisoned in a contempt proceeding for disobedience of a subpœna *duces tecum* when such subpœna was not legally served upon him.

I.

The Lumber Company's rights under the Fourth Amendment.

The proposition that the guaranty of the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures applies as well to corporations as to natural persons, is certainly no longer open to debate in this court. *Hale* v. *Henkel*, 201 U. S. 43, 76; *In re Tri-State Coal & Coke Co.*, 253 Fed. 605. It follows, therefore, that the constitutional rights of the Lumber Company under the Fourth Amendment were indisputably violated when representatives of the Government, without any search warrant, invaded its office on February 25th, subjected its employé Tobey to duress,

searched its premises, broke into a drawer of its safe, and seized and removed all the books and papers they could find. This high-handed and lawless raid in force by seven officials of the United States, accompanied by search and seizure, was not an incident to any lawful visit, and was no mere excess of official zeal on the part of minor functionaries. *Flagg* v. *United States*, 233 Fed. 481, 482-483. On the contrary, it was deliberately and carefully planned, probably under direction of the United States Attorney, and so timed that it might occur while both the president and general manager of the company were being detained under arrest by federal officers in Buffalo out of reach of the office of the company. No sooner had the documents been seized than they were taken to the office of the United States Attorney, examined, immediately presented to the grand jury, copied and photographed by him. The object of the outrage was thus fully accomplished, and discovery wrongfully obtained of alleged incriminating documents.

It is significant that these facts are not attempted to be extenuated and are not even mentioned in the Government's brief; although it is intimated on pages 2 and 6 that the books, documents and papers were duly obtained under and in response to a subpœna *duces tecum*. It is true that at the time of the raid a subpœna was handed to the employé Tobey, but he was given no opportunity either to comply with it or to consult counsel, and he was at once placed under restraint by the federal marshals, who proceeded without his consent to ransack the office, break into a box in the safe, and remove all the books, documents and papers they could find.

The Lumber Company forthwith applied to the court for restoration of the books, papers and documents thus wrongfully seized and removed. It did not wait until its trial upon a criminal charge, and then attempt to procure the exclusion of the evidence upon an objection that it was incompetent because illegally obtained, and thus interject into the trial a wholly confusing collateral issue, as did the defendant in *Adams* v. *New York*, 192 U. S. 585, relied upon by the Government. On the contrary, it followed the procedure distinctly approved by this court in *Weeks* v. *United States*, 232 U. S. 383, 396, and promptly demanded of the court that it undo the wrong which officials of the United States had perpetrated. Thereupon the District Court ordered the return of the papers, but impounded copies and photographs and refused any further relief, thereby permitting the officers of the Government to retain the benefit and possession of the fruits of their wrongful and deliberate violation of a constitutional right.

It is argued by the Government, in substance and effect, that, as the books, documents and papers thus wrongfully seized were ordered to be returned, the protection and immunity which the Fourth Amendment was intended to preserve and perpetuate were satisfied, and that the documents thus illegally procured and identified could then be lawfully called for under a subpœna *duces tecum*, and the Lumber Company compelled thereby to bring them into court, although information and discovery of the documents had been obtained only by a deliberate violation of the constitutional guaranty against unreasonable searches and seizures in direct

disregard of a clear and controlling adjudication by this court and of the Circuit Court of Appeals for the Second Circuit. But it is most earnestly submitted that no such practice can be tolerated, and that federal officers cannot be permitted thus deliberately to disregard and circumvent a constitutional guaranty and a solemn decision of this court. For, obviously, if the practice pursued in this case be now left uncondemned by this court, and the plaintiffs-in-error denied effective protection, similar outrages will continue and multiply. Illegal searches and seizures will then be made whenever a prosecuting officer desires information in the possession of any individual or corporation; the evidence thereby obtained will be examined and photographed; the documents will then be formally returned, but their production will be immediately secured by means of a subpœna *duces tecum* fully naming and identifying them. Unless this practice is to be condemned and prohibited, the rule declared by this court in *Weeks* v. *United States*, 232 U. S. 383, and by the Circuit Court of Appeals in *Flagg* v. *United States*, 233 Fed. 481, will be practically nullified and rendered worthless as a protection to the people of the United States. That rule indisputably provides that documents illegally seized by an official of the United States under such circumstances as are detailed in the above statement cannot be used in evidence against the person whose constitutional rights have been violated. The efficacy of the constitutional guaranty would be destroyed and its spirit disregarded if information and discovery of private papers and documents could be illegally obtained by high-handed and wrongful raids, searches and seizures by

government officials for the purpose of ascertaining and discovering evidence and then preparing and serving subpœnas *duces tecum*. The success of such a subterfuge and wrongful procedure, based on lawless acts by officials of the United States, ought to be prevented, and the only way to do so effectively is to enforce the doctrine of the *Weeks* case to its logical conclusion and according to its spirit and reason, and prohibit any advantage being secured by means of the violation of a constitutional right, particularly when attended by force and such outrageous misconduct by officials in the service of the Government as the foregoing statement brings before the court.

It is submitted that the present case clearly comes within the rule declared and the reasoning of the court in the case of *Weeks* v. *United States*, 232 U. S. 383, 391, where Mr. Justice Day speaking for the whole court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the sup-

> port of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

The fact that in the present case the court is dealing with a subpœna *duces tecum* and not with any question of the admissibility of evidence on a trial, does not distinguish the case from the *Weeks* case. The only opportunity afforded in a proceeding pending before a grand jury to raise the question of constitutional privilege is on the return of the subpœna *duces tecum*. Only then can the wronged individual adequately attempt to frustrate the effort to perpetuate the wrong done him by the unlawful search and seizure.

It should be no answer to these contentions to urge that the individual or corporation subjected to any such unlawful search and seizure, has a remedy against the officer by an action at law for damages. That remedy is in nearly every instance wholly inadequate, and the damages sustained are almost invariably beyond possibility of legal admeasurement. It would be little short of a travesty of justice to remit these plaintiffs-in-error to an action against the irresponsible members of the raiding party. Moreover, if there were any virtue in the suggestion, this court would have applied it in the *Weeks* case, but instead it declared (at p. 393):

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to pun-

> ishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

The Circuit Court of Appeals of the Second Circuit, in a very carefully prepared opinion, *Flagg* v. *United States*, 233 Fed. 481, considered a case involving facts similar to those in the case at bar and arrived at a conclusion which fully supports the contention of the plaintiffs-in-error. In that case the defendant Flagg's papers had been illegally seized by the Government without a search warrant, had been examined by the government officials, and then sometime later had been returned to him after they had fully served the purposes of the Government, although he had immediately after the seizure demanded their restoration. No subpœna *duces tecum* was issued to require him to produce the seized documents; but the officials of the Government in that case could accomplish their purpose and avail of the benefit from their wrongful act by utilizing what they had learned from the seized writings and producing the secondary evidence they had secured therefrom. Nevertheless, the conviction was reversed, Circuit Judge Coxe saying (pp. 482, 484, 486):

> "The defendant insists that his books and papers were taken possession of by the postal authorities of the United States under direction of the Department of Justice without process or legal authority of any kind. This matter might have been made perfectly clear but it has been left largely to inference and conjecture. Who the police officers were, where they got their orders, who the United States official was who apparently was directing the so-called 'raid'

does not satisfactorily appear, but it does appear that the papers and books were all carted to the federal building where they remained for several years and where the government officials worked over them for 18 months, although the defendant applied for their return September 26th, 3 days after they were seized. Some conclusions may be left to presumption, and it is impossible to believe, in the face of these facts, that the United States, acting through its accredited agents, was not responsible for the arrest of the defendant and the seizure of his property. To attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen or to some unknown parties, in the face of the fact that the property was immediately carted to the federal courthouse and remained there till the federal officials had obtained all the information desired, makes too severe a demand upon the imagination.

"The fact that the government officials returned the books after they had worked over them for a year and a half and had obtained all the information possible, is not of the least importance in considering the question of the initial illegality. We have, then:

"First, a seizure of the defendant's books and papers without warrant or legal process of any kind —an unlawful entry and an unlawful taking.

"Second, a presumption, well nigh conclusive, that the United States, whose agents took the books and papers into custody, and who alone was interested in prosecuting the defendant, was the party who made or instigated the unlawful seizure through its agents and servants.

"The question then is reduced to this—can a party be convicted of a crime upon proof procured from books and papers which have been taken from him by force and without a pretense of legal authority?

"Will the people be secure in their persons, papers and effects if seizures and searches made without pretense of legality are sustained by the courts? . . .

"The case of *Adams* v. *New York*, 192 U. S. 585,

differs from the case at bar in many important particulars but chiefly in the essential feature that in that case a valid search warrant was issued and incidentally the letters were seized in executing it. Had there been such a warrant issued on proper proof by competent authority in the case at bar the defendant's contention that the seizure of his property was unlawful, wanton and in violation of his constitutional rights might have been unavailing. Such a warrant issued by a court or magistrate having jurisdiction protects the officer executing it even though he may transcend his authority; but did the court intend to hold that a naked trespasser may seize the entire business including the books and papers of another and use them to convict him of a crime? We think not. To hold such a proposition is to give judicial sanction to a wholly illegal proceeding and make the necessity for a search warrant unnecessary. If parties without authority may enter another's place of business and carry away all his books and papers and use them in criminal proceedings against him, the constitutional amendments and the laws passed to prevent such invasions of his rights become dead letters. There are numerous cases which hold that where an officer executing a legal search warrant seizes property, not mentioned in the warrant, which may properly be considered in evidence, the right to introduce it is not lost by reason of its unlawful seizure, but we know of no case where a conviction has been sustained upon evidence obtained by such methods as were here employed. The *Adams* case proceeds upon the theory that having a legal right to search for property relating to the offense charged, such property will not be excluded from evidence because it is not specifically mentioned in the search warrant. Nowhere in the opinion is there any sanction for the proposition that one man may enter another's home, seize all his books and papers without process and procure his indictment and conviction upon the proof so obtained. In every case, so far as we are able to discover, where the court has permitted evi-

dence taken from the defendant to be used against him it was obtained by legal methods—a search warrant issued by the court or judge. . . .

"The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The information illegally obtained was in the possession of the United States attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' and were not concerned about the disposition of the 'primary evidence.'

"We do not deem it necessary to discuss all the questions mooted on the briefs relating to the admission and exclusion of evidence at the trial. We prefer to rest our decision upon the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States acting without warrant or pretense of legal authority."

In *In re Tri-State Coal & Coke Co.*, 253 Fed. 605, 608, two corporations had been subjected to an illegal search and seizure. The court directed, not only that the books and papers actually seized be returned, but also "all copies, photographs, or memoranda thereof, made since the same were taken." Thus, in that case the court plainly regarded the constitutional rights of the corporations as requiring the restoration of the *status quo* and the protection of the corporations in every respect possible against any prejudice from the wrongful search and seizure. (See also *United States* v. *Wong*, 94 Fed. 832.) This practice is in striking contrast to that pursued by the learned court below in the case at bar, who practically permitted the Government to retain and enjoy the full

benefits and fruits of the illegal acts of its officials by impounding the copies and photographs made during the wrongful retention of the documents.

The only authority which the Government refers to as foreclosing the plaintiffs-in-error from presenting to this court the foregoing contentions under the Fourth Amendment is *Adams* v. *New York*, 192 U. S. 585. The distinction between the *Adams* case and the case at bar is shown in *Weeks* v. *United States*, 232 U. S. 383, 392, 394-396, and *Flagg* v. *United States*, 233 Fed. 481, 484, quoted *supra*, and these authorities establish the inapplicability of the doctrine of the *Adams* case. In that case, moreover, there was a valid search warrant issued by a state court, and the documents in question had been obtained merely as an incident to an otherwise lawful act. The question now presented under the Fourth Amendment was not decided in the *Adams* case, and the Fourth Amendment does not, of course, apply to the States.

It should furthermore be noted that the plaintiff-in-error, the Silverthorne Lumber Company, Inc., had existed for nearly five years at the time when the subpœnas in question were issued, and was then and always had been actively engaged in carrying on a large lumber business. Substantially all its business affairs and transactions were recorded in the books and papers called for by the six subpœnas served upon it. It is contended that the periods of time mentioned in the subpœnas in fact accomplish no substantial reduction in the quantity of material to be produced. There was no proof to show that all this large mass of records was necessary, and it is plain that the business of the company could not

continue to be carried on if it were denuded of all its records. The subpœnas themselves, therefore, constituted an unlawful search and seizure, within the settled rule laid down in *Boyd* v. *United States*, 116 U. S. 616, and *Hale* v. *Henkel*, 201 U. S. 43, 76-77, because "far too sweeping in [their] terms to be regarded as reasonable."

It is insisted by the Government (brief, pp. 6-7) that this court sustained a subpœna *duces tecum* of like scope in *Wheeler* v. *United States*, 226 U. S. 478. In that case, however, the company affected by the subpœna had been dissolved and was long out of business, and, therefore, could not be seriously, or at all, affected by having its books and papers taken before the grand jury. Again, in that case the corporation itself made no objection to producing the records and did not assert any constitutional right in respect thereto, and finally, there was "nothing to show [that the subpœna there involved] was so broad as to be objectionable" (p. 489).

The *Wheeler* case is, therefore, clearly not a controlling precedent in the case at bar, and certainly does not foreclose or render frivolous and unsubstantial the question now raised by the plaintiffs-in-error. That question is whether or not officials of the United States can deliberately violate the rights of individuals or corporations by wrongful searches and seizures without warrant of law in order to obtain knowledge and discovery as to the existence and contents of all the private books and documents of an accused, and, having thus wrongfully obtained the discovery and been compelled to return the books and documents, secure full benefit from the wrong by means of subpœnas *duces tecum*. The answer

to that question cannot be at all doubtful provided the doctrine of the *Weeks* case is to be maintained unimpaired. If government officials can avail of their own wrong, notwithstanding the emphatic admonition of this court in the *Weeks* case, the constitutional guaranty against unreasonable searches and seizures will have been rendered practically futile as to both individuals and corporations.

Indeed, it must be manifest that, if this writ of error is to be now summarily dismissed by the court without hearing argument, such a disposition of the case will reasonably be interpreted by all officials of the United States as full authority for continuing just such high-handed and outrageously illegal procedure as was followed in the case at bar and for violating by unlawful searches and seizures the home or private office of any one whom the Government is seeking to prosecute. Full information and discovery of documentary evidence in the possession of accused persons can then be wrongfully obtained and the official wrongdoer accomplish his purpose notwithstanding the guaranty of the Constitution and the declaration of this court to the contrary. The only safe rule must be that no benefit shall be secured by prosecuting officers of the Government and no prejudice imposed upon individuals or corporations through high-handed and deliberate violations of constitutional rights by officers of the law, who should ever be mindful that "no officer of the law may set that law at defiance with impunity." *United States* v. *Lee*, 106 U. S. 196, 220.

II.

THE LUMBER COMPANY'S RIGHTS UNDER THE FIFTH AMENDMENT.

The brief of the Government asserts (p. 7) that a corporation is not entitled to the constitutional protection against self-incrimination, and the cases of *Hale* v. *Henkel*, 201 U. S. 43, and *Wilson* v. *United States*, 221 U. S. 361, are cited as conclusively adjudicating this point, so as to foreclose its further discussion before the court.

The plaintiffs-in-error, however, insist that neither of these cases determined the precise point, and that the court has not yet had presented to it any case which required it to rule the point, or where, as in the case at bar, the corporation, charged with a crime having no relation to any federal franchise or privilege, itself invoked the protection of the constitutional guaranty. It is true that there have been *dicta* upon the subject by various learned Justices, but an examination of the decisions will readily disclose that the remarks in question were *obiter*. Indeed, this fact has been distinctly recognized and commented upon by lower federal courts. *United States* v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301, 304, and *Cassatt* v. *Mitchell Coal & Coke Co.*, 150 Fed. 32, 45. In the first case cited District Judge Thompson in July, 1915, subsequent to the decisions in *Hale* v. *Henkel* (1906) and *Wilson* v. *United States* (1911), among other things, said:

> "The question of the right of the government to compel the railroad company to incriminate itself by producing its records, documents, and papers has

> not been decided by the Supreme Court in any case in which the corporation whose papers were sought to be produced was the defendant charged in the indictment."

And in the latter case cited Judge Lanning, speaking for the Circuit Court of Appeals for the Third Circuit, in January, 1907, after referring to the opinions in *Hale* v. *Henkel*, declared that—

> "These varying expressions of opinion emphasize the impropriety of any expression of opinion by us [on this point] before counsel shall have given us the aid of full arguments thereon."

A brief consideration of the decisions themselves will readily show that the exact point now presented has not heretofore been actually before this court for decision. In *Hale* v. *Henkel*, 201 U. S. 43, and its companion cases (*McAllister* v. *Henkel*, *id.* 90, and *Nelson* v. *United States*, *id.* 92), the McAndrews & Forbes Company, the corporation whose books were sought to be compulsorily produced, was not served with any subpœna; it was not directed to produce any book or paper, and it took no action to assert its own constitutional rights in the matter or to resist the production of its private records. Its secretary, Hale, was alone served with a subpœna which required him to produce the papers in question, and he refused to do so, because, as he alleged, the documents might incriminate *him* (201 U. S. at p. 46). The question of incriminating the corporation was not in fact raised and was not before the court. It was held that Hale could not plead his own privilege because a statute granted him immunity, and it was added that he as agent could not rely upon any constitutional privilege which

his corporation might assert under the Fifth Amendment, because the privilege against incrimination was personal to the witness and not derivative from his principal. The court said (201 U. S. at p. 70):

> "The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by *oral* evidence in the person of some of its agents or employés."

It is, of course, manifest that a corporation cannot directly give oral testimony, and, consequently, cannot claim any privilege in respect thereof. Orally it must always speak through natural agents. But what its right would be when it was itself called upon by subpœna *duces tecum* to produce incriminating documentary evidence in a proceeding directed against itself, and when it thereupon duly and promptly claimed its privilege in its own behalf, was not presented or decided in *Hale* v. *Henkel* and not at all involved in the facts then before the court.

In *Wilson* v. *United States*, 221 U. S. 361, also relied on by the Government, the corporation was not charged with any offense, but its president, Wilson, was so charged. A subpœna *duces tecum* directed to the corporation was served upon him requiring the corporation to produce certain writings. The president declined to produce the papers called for upon the ground that they would tend to incriminate *him* (221 U. S. at pp. 363, 369, 377). The board of directors of the corporation appeared before the court, declared their willingness and that of the corporation itself to comply with the writ, and presented to the court their formal action taken at a

meeting of the board by which they on behalf of the corporation had demanded of the president that he deliver up to them the corporate books so that they could obey the subpœna. The following extracts from the decision (221 U. S. at pp. 371, 376) clearly disclose these facts:

> "On behalf of the directors before the court it was stated that they had made efforts to obtain the books for production before the grand jury, but that Wilson had declined to surrender them. They presented the minutes of a meeting of the board of directors held on that day at which these directors, constituting a majority of the board, had passed a resolution demanding of Wilson the possession of the letter press copy books called for by the subpœna 'for the production of the same before the Federal Grand Jury.'"
>
> "The corporation made no objection of any sort. The appellant did not attempt to assert any right on its part; his conduct was in antagonism to the corporation, so far as its attitude is shown. A majority of the directors, not including the appellant, appeared before the court and urged their solicitude to comply with the writ. They presented their formal action taken at a meeting of the board, in which they demanded of the appellant the delivery of the books for production before the grand jury."

This corporate action effectually waived whatever privilege the corporation had or might have, and, therefore, the question whether a corporation could be compelled to produce documents and incriminate itself against its will and in spite of its claim of privilege, duly and seasonably made, was not presented in the case and could not, therefore, properly be adjudicated therein. This court in the *Wilson* case merely decided that Wilson could not assert the corporation's privilege when it was subpœnaed and had duly waived its rights.

In *Dreier* v. *United States*, 221 U. S. 394, decided simultaneously with the *Wilson* case, the subpœna was not even addressed to the corporation. It was addressed to and served upon one of its officers, and the corporation took no steps to claim its privilege and made no objection to the production of the documents.

The case of *Wheeler* v. *United States*, 226 U. S. 478, is similar in principle to the above, although the subpœna was there directed to the corporation. The corporation made no objection and claimed no privilege in respect of the books and papers called for. On the contrary, the officers who received the writ asserted that the papers were their private property and tended to incriminate *them*. The court found, to the contrary, that the books and papers were still corporate records, and, there being no protest whatever by the company itself, upheld and enforced the subpœna. *Grant* v. *United States*, 227 U. S. 74, is to the same effect as the *Wheeler* case.

It will be perceived that in none of these cases did the corporation itself raise the question of its own privilege, whilst the Lumber Company has done so in the case at bar, and that, consequently, the precise question whether a corporation is entitled to immunity against self-incrimination through compulsory production of its books and papers, has not been directly decided by the court. Whatever may have been heretofore said in this court upon the subject was, therefore, plainly *dictum*, to which the following observation of Mr. Justice Pitney in *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 538, is peculiarly applicable:

> "As was well said by Mr. Chief Justice Marshall, in one of his great opinions, *Cohens* v. *Virginia*,

> 6 Wheat. 264, 399: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' And if this be true with respect to mere *dicta*, it is no less true of concessions made for the purpose of narrowing the range of discussion, or of testing, by assumed obstacles, the validity of the reasoning by which the court reaches its conclusions upon the point submitted for decision."

If, as Chief Justice Marshall said, *dicta* "ought not to control the judgment in a subsequent suit when the very point is presented for decision," it is submitted that the *dicta* upon which the Government now relies certainly should not be deemed to foreclose the question to such an extent as to deny to a party directly affected and directly raising it the opportunity to be heard on full argument by counsel at the bar to the end that the question may once and for all be actually considered and determined upon its merits.

It is, of course, not the office of this memorandum to argue at length the merits of the question arising in the present case under the Fifth Amendment, but the views of counsel may be indicated and outlined in order to show the substance of the claim of constitutional privilege.

There can be no reasonable denial of the proposition that at common law a corporation has and always enjoyed an immunity against self-incrimination. *Rex* v. *Cornelius*, 2 Strange 1210; *Rex* v. *Worsenham*, 1 Ld. Raymond 705; *Regina* v. *Mead*, 2 Ld. Raymond 927; *The King* v. *Purnell*, 1 W. Bl. 37, 45; *The King* v. *Heydon*, 1 W. Bl. 351;

Regina v. *Granatelli*, 7 State Tr. n. s. 979, 986, 1062; *Goff* v. *Star Printing Co.*, 21 Abb. N. C. 211; *Batterman* v. *Journal Co.*, 28 Misc. 375, 376; *Logan* v. *Pennsylvania R. Co.*, 132 Pa. St. 403, 408; 4 Wigmore on Evidence, p. 3116; 5 *id.* p. 545. The general rule upon the subject is stated by Prof. Wigmore as follows:

> "It is also plain . . . that a *corporation*, when discovery is sought from it as such, is to be equally protected from disclosure, so far as it is capable of committing a criminal act . . .
>
> "The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration."

And in the *Logan* case, *supra*, the court expressly ruled the point, saying:

> "We have carefully considered the position taken by the plaintiffs' counsel at the reargument, that we may require the defendant corporation to produce the required writings, even though a natural person in a like case could not be called upon for their production. We are not able to agree with the reasoning. We think the rules of evidence and the rules of law for the production of writings, are essentially the same whether the defendant is a natural or an artificial person."

It must, therefore, have been in the light of this settled rule of the common law, and with the plain intent to embody it in the Constitution, that the founders of our Government used the following language in the Fifth Amendment:

> "No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public dan-

> ger; nor shall any *person* be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

There is no warrant for holding that a corporation is not a "person" within the meaning of the term as employed in the Fifth Amendment. Certainly a corporation may not be charged with an infamous crime except upon a presentment or indictment by a grand jury (*United States* v. *J. Lindsay Wells Co.*, 186 Fed. 248); few would seriously dispute its right to be free from repeated prosecutions and punishment for the same offense; and it is too well established to be now controverted that a corporation is as much a "person" whose liberty and property are constitutionally guaranteed under the Fifth and Fourteenth Amendments against deprivation without due process of law, as any natural person (*Santa Clara County* v. *Southern Pac. R.R. Co.*, 118 U. S. 394, 396; *County of San Mateo* v. *Southern Pac. R.R. Co.*, 13 Fed. 145, 151). There is then no justification to be found in the words of the Fifth Amendment for denying that a corporation is likewise a "person" within the meaning of the clause against self-incrimination, particularly when it is recalled that the common law included corporations among those entitled to this particular privilege and immunity. Manifestly, if the framers of the Constitution had intended a distinction between natural persons and corporations and any alteration in the nature of the common law immunity which they were em-

bodying and perpetuating in the Constitution, they would have plainly declared it, especially in a matter of such great moment (*In re Pacific Ry. Com'n*, 32 Fed. 241, 250). It is trite learning that a corporation is deemed a "person," a "citizen" and one of the "people" in the sense in which those terms are elsewhere employed in the Constitution (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154; *Louisville Railroad Co.* v. *Letson*, 2 How. 497, 552; *Hale* v. *Henkel*, 201 U. S. 43, 76), as well as within the meaning of innumerable statutes containing these and similar expressions; and it is, therefore, quite impossible to frame a logical theory, consistent with these precedents, that will exclude corporations from the connotation of the word "person" in the Fifth Amendment.

The fact that the privilege against self-incrimination is personal and that a corporation cannot itself appear and give oral testimony and thus claim the privilege while in the witness chair, offers no tenable ground of distinction. It merely means that a corporation cannot claim the privilege in relation to oral testimony which it can never give. But plainly a corporation *can* be a witness against itself through its own records, books and papers as effectually as any natural individual or copartnership, and it is certainly called upon to testify against itself when it is itself required, as in the case at bar, to produce its books and papers in a criminal proceeding directed against it. There is, therefore, nothing inherently unreasonable in claiming for a corporation the right to be protected against self-incrimination to the extent to which its own records can furnish evidence

against it for the purpose of subjecting it to punishment by way of fines and penalties "in a criminal case."

It is, to repeat, beyond controversy that a corporation is numbered among the "people" who, under the Fourth Amendment, are entitled "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," and "the intimate relation" between, and correlative character of, the Fourth and Fifth Amendments were pointed out by this court in *Boyd* v. *United States*, 116 U. S. 616, 633. If this be still true, it is difficult to perceive why a corporation should not be regarded as a "person," and, therefore, protected against being compelled to incriminate itself, under the Fifth Amendment.

But even if a corporation were not a "person" within the meaning of this particular clause of the Fifth Amendment, it would not follow that it would have no privilege or immunity against self-incrimination. Prof. Wigmore has pointed out (*supra*) that "the privilege began, continued, *and now exists at common law, independently of statute;* the Constitution merely guarantees it against legislative alteration." As we have already noted, corporations enjoy this right at common law as a rule of evidence and procedure, and there is no statute, state or federal, which has in any wise abridged or abolished their right in this respect. The Lumber Company in the case at bar was, therefore, entitled to claim its *common law* privilege against self-incrimination as an established rule of evidence and procedure, quite irrespective of the recognition and perpetuation of the right in and by the Constitution; and the effort of the District Court to de-

prive it of that right, to its jeopardy and prejudice, denied it the due process of law which another clause of the Fifth Amendment assures to all, including corporations.

The whole foundation upon which rest the current misunderstanding and oft-repeated assertion that *Hale* v. *Henkel*, 201 U. S. 43, held that in the federal courts no corporation ever has the right to resist self-incrimination, is the mistaken notion that the opinion declares the existence in the national government of a general visitatorial power over all state corporations; but it is in the highest degree noteworthy that, in fact, no such sweeping visitatorial right was claimed by the court in that case. Mr. Justice Brown carefully pointed out (at p. 75) that "it is not intended to intimate . . that the [federal government] has a *general* visitatorial power over *state* corporations." All he asserted was that, although the corporation there in question drew its powers and right to exist from the state of New Jersey, its "franchises, *so far as they involve questions of interstate commerce*, must also be exercised in subordination to the power of Congress to regulate such commerce, and *in respect to this* the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner," and towards that end may require the corporation to incriminate itself (*id.*). And in *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 215, Mr. Justice Day said:

> "In *Hale* v. *Henkel*, 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was

> nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by Congress."

It is unnecessary in the case at bar even to challenge this reasoning. In the *Hale* case, the McAndrews & Forbes Company was charged with violating the Sherman Anti-Trust Law. Perhaps that enactment may be regarded as imposing a condition upon the exercise of the franchise of corporations to engage in interstate commerce, and as thus endowing the national government, not with "a general visitatorial power over state corporations," but with the right to exercise limited visitatorial power for the purpose of discovering whether a state corporation engaged in interstate commerce has attempted to erect a monopoly therein in violation of the Sherman Law. In the case at bar, however, the Lumber Company is *not* charged with any crime that relates to any federal right or franchise whatsoever—neither the right to engage in interstate commerce as in the *Hale* case, nor the right to use the mails as in the *Wilson* case, 221 U. S. 361, 367. It is accused of having conspired with others to cheat a customer, who happened to be a railroad company in the hands of the federal authorities. This crime might well have been committed by a corporation which exercised no right or franchise derived from the national government; and, for all that the record discloses, that is the case here. The alleged right, under such circumstances, to compel the Lumber Company to incriminate itself has no warrant in, or relation to, any federal franchise exercised by it, or the abuse

of any such franchise. It is purely an attempt on the part of the federal authorities to exercise "a general visitatorial power over state corporations," which the court in *Hale* v. *Henkel* in terms declined to countenance.

There is, moreover, in no government, state or federal, the right to exercise visitatorial power over corporations in respect of any and every crime with which a corporation may be charged and have capacity to commit. There are innumerable crimes and *mala prohibita* which a corporation may commit without doing any *ultra vires* act. For example, it may cheat a customer by fraudulently giving him short weight or measure, or conspire so to do; it may libel a former employé; it may mistreat its animals or cattle; it may illegally employ child labor, etc., and, nevertheless, always act wholly within its charter powers. The right of visitation over private corporations gives only the right to investigate whether the charter powers of the corporation have been violated or, as Mr. Justice Brown expressed it (*Hale* v. *Henkel*, 201 U. S. 43, 75), the right to "find out whether it [the corporation] has exceeded its powers." *United States* v. *Union Pacific R.R. Co.*, 98 U. S. 569, 570, 617; *Matter of Barnes*, 204 N. Y. 108, 116; *Montgomery* v. *Smead*, 97 Misc. 283, affirmed 179 N. Y. App. Div. 948; sec. 101, N. Y. Gen. Corp. Law. In the case at bar none of the Lumber Company's charter powers has been exceeded, and there is, therefore, no right in any authority, state or federal, to assert visitatorial power over it.

It would seem, furthermore, that the visitatorial power is properly to be exercised only in proceedings to forfeit the charter of a corporation, and not to be extended to

proceedings having no such object in view and seeking merely to inflict punishment or penalties for crime.

It has been suggested by Professor Wigmore (5 Wigmore on Evidence, p. 545) that "*Hale* v. *Henkel, supra,* may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one," and thus no bar to unrestrained inquisition. But even that theory would not advance the Government in the case at bar, for here, as we have seen, no *ultra vires* act is charged against the Lumber Company, and certainly no abuse of any federal right or franchise.

It is, in addition, most respectfully submitted that the *dictum* in *Hale* v. *Henkel* is the result of a failure to discriminate between legislative and judicial power. It may be true, as Mr. Justice Brown stated (201 U. S. at p. 75) that "there is a reserved right *in the legislature* to investigate . . . and find out whether it [the corporation] has exceeded its powers"; but it does not follow that the legislature has in fact exercised that power or conferred it upon the courts where it has enacted no legislation towards that end. If Congress had passed a law declaring that no corporation should engage in interstate commerce or use the mails without subjecting itself to visitatorial jurisdiction or waiving its privilege against self-incrimination, the courts might thereafter, perhaps, be justified in exerting unrestricted visitatorial powers against such corporations. No such power, however, has been exercised by Congress or granted to the courts, and

it ought not to be implied and invoked by the judiciary where Congress has not seen fit to impose any such conditions upon the right to engage in interstate commerce or the right to use the mails. Certainly no such power can be asserted in the case at bar where the alleged offense of the Lumber Company has no connection with any federal privilege or with interstate commerce.

We refrain from further discussion now of this highly interesting and debatable subject. It is enough to submit with all deference that the foregoing statement has fairly and reasonably shown that the question now raised under the Fifth Amendment of the Constitution is substantial, that it has not been foreclosed by the decisions of this court, and that the defendant corporation, plaintiff-in-error, is entitled to a day in court to the end that it may be heard by its counsel in full oral argument in defense of a great constitutional guaranty, the protection of which has so far been wholly and wrongfully denied to it.

III.

As to the defective service of the subpœnas.

The record also shows, as set forth in the foregoing statement, that the subpœnas *duces tecum* were not duly served upon the plaintiff-in-error Frederick W. Silverthorne, and that he could not, therefore, be legally punished for refusing to comply therewith. The objection was duly raised in the court below.

In the recent case of *Sugarman* v. *United States* (Oct.

Term, 1918—No. 345, decided Mar. 3, 1919), the court said:

> "Thirty of the rulings excepted to below are assigned as errors here. If any one of them involves a constitutional question which is substantial, or was such when the defendant sued out his writ of error, we have jurisdiction to review all the questions raised and it is our duty to determine them, so far as necessary to afford redress, even if we should conclude that the constitutional question was correctly decided below. *Williamson* v. *United States*, 207 U. S. 425, 432, 434; *Goldman* v. *United States*, 245 U. S. 474, 476."

See also *Michigan Cent. R.R.* v. *Vreeland*, 227 U. S. 59, 63, to the same effect.

The court will, consequently, have to consider, in the case at bar, whether the service of the subpœnas upon Mr. Silverthorne was regular and legal.

The federal statutes do not provide how subpœnas *duces tecum* shall be served nor do the rules of court. The matter is thus remitted for regulation to the common law or local statute, and both (see sec. 852, N.Y. Code Civ. Proc.) require the original subpœna to be exhibited to the witness. In the case at bar the original subpœnas were not shown to Mr. Silverthorne, nor did the process server so much as tell him what the papers were. The marshal, without any explanation whatever, merely laid copies of the papers in front of Mr. Silverthorne and departed.

The service was, therefore, plainly bad, and it follows that Mr. Silverthorne, who duly and promptly objected thereto on that specific ground, could not properly be punished for contempt for failing to comply with the

subpœnas. The suggestion in the Government's brief (p. 11) that he waived the point of service, is refuted by the record.

CONCLUSION.

The rights which this writ of error presents to the court for adjudication are not only substantial but of the greatest importance. If the court should now dismiss the writ or summarily affirm the judgment without oral argument and thus adjudicate that the points raised are clearly untenable or frivolous, innumerable innocent persons, individuals as well as corporations, will hereafter enjoy their constitutional right to be protected against unreasonable searches and seizures only at the sufferance of public officials, and official lawlessness will be encouraged. Corporations, which are after all but associations of individuals just as copartnerships are (*Hale* v. *Henkel*, 201 U. S. at p. 76), will then, moreover, be outlawed and subject to have their property appropriated by fines and penalties under circumstances in which the natural persons, who are their competitors and no better, would enjoy absolute immunity because of their constitutional privilege against self-incrimination. It is submitted that before any such doctrines are to become firmly embedded in our constitutional law, so as even to preclude further discussion, the plaintiffs-in-error herein should be accorded a day in court and their contentions fully heard through their counsel. Surely, under our system of precedents, no practice could be more dangerous than to have important and far-reaching constitu-

tional questions finally determined without oral argument on the basis of *obiter dicta*.

It is, therefore, submitted that the motion of the Government to dismiss this writ of error or affirm should be denied or the further consideration thereof postponed to the hearing on the merits.

If either course be adopted, then it is respectfully submitted that the application of the plaintiff-in-error Frederick W. Silverthorne to be enlarged upon bail should be reconsidered. He is at present imprisoned for a nominal contempt committed under advice of counsel in order to secure a prompt review by this court of the questions hereinabove discussed, and his continued restraint pending final hearing and disposition of the cause seems unnecessary, particularly in view of the fact that if the decision should eventually be in his favor, he would have suffered unjustly and be remediless. It is submitted that a party *bona fide* believing himself to be aggrieved should not be thus denied an opportunity to have this court review what he earnestly asserts to be an erroneous adjudication in respect of his constitutional rights.

New York, May 21, 1919.

WILLIAM D. GUTHRIE,
FREDERIC D. MCKENNEY,
MYER COHEN,
HENRY W. KILLEEN,
JAMES O. MOORE,
Of counsel for plaintiffs in error.

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Supreme Court of the United States.

OCTOBER TERM, 1919, NO. 358.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,
Plaintiffs-in-error,

vs.

THE UNITED STATES OF AMERICA,
Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

WILLIAM D. GUTHRIE,
HENRY W. KILLEEN,
JAMES O. MOORE,
Of counsel for plaintiffs-in-error.

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Supreme Court of the United States.

OCTOBER TERM, 1919—No. 358.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,

Plaintiffs-in-error,

v.

THE UNITED STATES OF AMERICA,

Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

This writ of error presents for review a final judgment punishing both plaintiffs-in-error for contempt of court because of their refusal to obey the demands of subpœnas *duces tecum* directed to the plaintiff-in-error, Silverthorne Lumber Company, Inc. (pp. 103-4, 107-10, 113).

On June 2, 1919, the Government submitted a motion to dismiss the writ of error or affirm the judgment, but after receiving briefs, the court on June 9th determined to postpone the further consideration of the motion until the hearing upon the merits, and thereupon, reconsidering its prior refusal to enlarge the plaintiff-in-error Frederick W. Silverthorne upon bail, granted his application (October Term, 1918—No. 996).

The jurisdiction of the court is invoked in the case at bar to review a final judgment of contempt upon the ground that it involves the decision of questions arising under the Constitution of the United States. The procedure adopted by the plaintiffs-in-error to procure such a review is that prescribed by the court in such cases as *Alexander* v. *United States*, 201 U. S. 117, 121-2, and *Nelson* v. *United States*, *id.* 92, 98.

The main points of constitutional law to be argued are briefly as follows:

I. That the Government cannot, under the cover or pretext of serving a subpœna *duces tecum*, consummate an unreasonable search and seizure, and thereby dispense with the limitations upon the issue of search warrants and set at naught the right guaranteed by the Fourth Article of Amendment to the Constitution of the United States in the following language, viz.:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

II. That any papers and effects wrongfully searched for and seized by the Government in violation of the Fourth Amendment cannot be used by it as evidence against the person or persons whose constitutional rights have been thus violated.

III. That the production of papers and effects thus wrongfully searched for and seized cannot be compelled before a grand jury, because knowledge of their existence

and contents was unlawfully obtained by means of the violation of an express constitutional guaranty, and that to permit any such compulsory production would tend to deprive the Fourth Amendment of its efficacy as a practical protection against unlawful searches and seizures.

IV. That the private papers of a state corporation cannot be thus wrongfully seized and used as evidence to convict it of a crime having no relation to any federal right, privilege or franchise exercised by it, without violating the guaranty of the Fifth Amendment that—

> "No person . . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT.

The plaintiff-in-error Silverthorne Lumber Company, Inc.,* is a New York corporation engaged in buying and selling lumber at North Tonawanda, New York (fol. 175). The plaintiff-in-error Frederick W. Silverthorne is its president, and his father, Asa K. Silverthorne, is its general manager (*id.*). It is a small corporation owned by the Silverthorne family. Its capital stock consists of 1,500 shares of common stock of the par value of one hundred dollars each, of which 1,311 shares have been issued and are outstanding. Of these Mattie F. Silverthorne, the mother of the individual plaintiff-in-error, owns 1,106 shares, 1,047 standing in her own name on the books of the company, 49 in the name of her son-in-law, C. N. Richards, 8 in the name of Walter H. Tobey, an employé and the treasurer of the company, and 2 in

* For convenience the corporation will be hereinafter referred to as the Lumber Company.

the name of Anthony W. Brick, one of the salesmen and the secretary of the company. The remaining 205 shares outstanding are owned by the plaintiff-in-error Frederick W. Silverthorne (fols. 175-6). The corporation is thus obviously a family affair, owned by the individual plaintiff-in-error and his mother. The officers other than the members of the Silverthorne family have no beneficial interest therein except as employés, and hold offices and discharge duties as such under the direction and control of the Silverthornes and for their benefit.

In February, 1919, the grand jury at Buffalo, New York, found an indictment against Frederick W. Silverthorne, the president of the Lumber Company, and his father, Asa K. Silverthorne, the general manager, charging them with conspiring with others to defraud the United States in violation of section 37 of the Federal Penal Code (pp. 1-8). The indictment set forth that the Lehigh Valley Railroad, while under federal control, had agreed to purchase a certain number of grain door boards from one McConkey, who did business in North Tonawanda, New York, to be delivered to it at Buffalo, and that the defendants had fraudulently conspired to cause less than the agreed number to be delivered to the railroad but, nevertheless, to collect from the federal authorities in control of the carrier payment for boards not delivered (*id.*). On the morning of February 25th, at about 7:30 o'clock, the plaintiff-in-error Silverthorne and his father, Asa K. Silverthorne, were both placed under arrest upon a warrant charging them with conspiring to defraud the United States as above stated (fols. 34, 38).

The Silverthornes reside in the city of Buffalo, about twelve miles from the office of the Lumber Company at

North Tonawanda, and were arrested at their respective homes (fols. 35-6, 38). They were at once taken from their homes to the office of the United States marshal in the federal building in Buffalo, where they were detained in custody a number of hours (*id.*). After considerable delay, they were brought before a commissioner and admitted to bail (*id.*). Thereupon and on the same afternoon they went to the office of the Lumber Company at North Tonawanda (*id.*). They found it unlocked, deserted and abandoned. All the men in the employ of the company had earlier in the day been ordered by federal officers to go to the federal building in Buffalo and had done so at once (fols. 36, 38, 41, 50). The Silverthornes found the place in disorder and confusion, the office quite denuded of books, papers and documents and the safe and desks and drawers open. One drawer of the safe appeared to have been forced and broken into, and valuable property was missing (fols. 35-6, 38). The next morning, February 26th, they learned that while they were being detained what was a needlessly long time in the office of the United States marshal, about seven federal officers, representing the United States marshal and the Department of Justice, without any search warrant whatever, had descended upon the office and yards of the Lumber Company, had searched the premises and had seized and carried off all the books, papers and documents they could find (pp. 21-4). What then occurred is described as follows in the affidavit of Walter H. Tobey (pp. 22-4):

> "At about 10:15 o'clock in the forenoon of February 25, 1919, while I was engaged at work upon the books of the petitioner [*i. e.*, the Lumber Company]

in the office of the petitioner at North Tonawanda, N. Y., an automobile containing seven persons drew up in front of the office and stopped. The occupants left the automobile and two of them walked down on the south side of the office, opposite where I was engaged, and two men, as I am informed, walked down on the north side of the office; then the others came into the office through the main door, which is on the extreme north end of the office. I heard men talking to the clerks in the outer office. Then six or seven men came into my office. At about that time, another automobile drew up in front of the office and I think it had only one occupant beside the driver. One of the men, who came into the room, stated that he was a United States Marshal; another man stated that he was some official, and another claimed that he was a different official, but what their respective positions were, I do not recollect. Two of them showed me their badges.

"The man, who represented himself to be the United States Marshal, then said that they wanted all the books and papers of the Company pertaining to railroads, Shingle Mills Selling Company and James W. McConkey. I asked them what the idea was, and they said they wanted them in court and that they must be taken there forthwith. The marshal then read to me a subpœna, addressed to me,* directing me to produce the books and papers aforementioned. Then, without receiving any acquiescence or consent upon my part, the so-called marshal and the men with him proceeded through the office, taking down books, files, papers and memoranda of all kinds. One so-called official stayed with me in the room where I was, and I was not permitted to go anywhere about the office unless this man accompanied me. There are five different rooms in the offices in which are kept books of account, papers, memoranda, etc. The men, other than the one guarding me, then circulated through the various rooms and brought out files of books, papers, memoranda, etc., and carried

* The subpœna was in fact addressed to the Lumber Company (p. 29).

them out and placed them in one of the automobiles. The men, who were carrying these books out of the office and placing them in the automobile, did not show me what books they were taking, and I had no opportunity and was not allowed to make any tabulation of the books, papers and effects, which were thus taken from the office and placed in said automobile. I believe it would have taken a full hour to have tabulated a memorandum of the books and papers taken.

"I was then told that I would have to forthwith go up to the United States Court at Buffalo, and that all of the bookkeepers, clerks in the office and men in the yards would also have to go to Buffalo.

"Before we left for Buffalo, I stated to the men making the search that I would like to confer with the petitioner's attorney before I went to Buffalo, and one of their number replied that I did not need an attorney.

"They then compelled me and the other office employees to get into the automobile and they drove us to the United States District Attorney's office in the Federal Building in the City of Buffalo. Before we left Tonawanda, all of the employees of the petitioner, in and about the yards, were directed to go to the United States Attorney's office in the Federal Building, in Buffalo, and they, so far as I am informed, went to Buffalo on trolley cars and appeared at the United States Attorney's office on the same day.

"After we were in the United States Attorney's office for a short time, the men who seized the books at the petitioner's office brought the books upstairs in the Federal Building and carried them into the private office of the United States District Attorney. After that I did not see the books.

"We arrived at the Federal Building a little before noon. The remainder of the day, the other employees of the petitioner and myself waited around the United States Attorney's office until about five o'clock. At about five o'clock in the afternoon, I was directed to appear again in the United States

Attorney's office the following morning at ten o'clock.

"On the morning of the 26th, about ten o'clock in the forenoon, I appeared at the United States Attorney's office, in pursuance to said direction, and was shortly thereafter called before the Grand Jury. I was not directed to produce any of the books of the petitioner before the Grand Jury, and, in fact, I did not produce any of the books of the petitioner before the Grand Jury, and I was not examined in any wise respecting the books, papers and documents of the petitioner, which were taken from the office of the petitioner, as aforesaid. After a brief examination respecting the incorporation of the petitioner and its officers, stockholders and some of its methods of doing business, I was excused and informed that I was discharged from further appearance.

"When I was before the Grand Jury, I did not see any of the books and documents of the petitioner, and have not seen them since they were taken in the United States District Attorney's office.

"The men who took the petitioner's books, papers and documents, as hereinbefore mentioned, took all that the petitioner had, and the petitioner has now no books, contracts, documents, bank books, check books, or records of any kind, and I am compelled to carry its business transactions upon a pad. It is absolutely necessary in the conduct of the petitioner's business that the books, memoranda and documents, taken from its files, should be returned forthwith. The petitioner's income tax [return] has not been made out and it will be impossible to prepare it without the books and documents in question."

The subpœna *duces tecum* (p. 29) which was read to Tobey required the Lumber Company to attend "forthwith to testify and give evidence in regard to an alleged violation of the statutes of the United States by John Doe" and to produce—

"all documents, books, records, memorandums, papers, etc., relating to movements of cars into and

> out of your yards; also relating to sale, billing, invoicing and charge of said cars and contents thereof, now in your custody, and all other papers, evidences or writings concerning these premises, which you have in your possession or under your control."

The subpœna was plainly unreasonable in scope and equally unreasonable in requiring production of such a large mass of papers forthwith. It was, however, under the seal of a court and tested in the name of a judge of the United States and threatened "the penalties provided by law" if it were not obeyed (p. 30), and was patently calculated to operate *in terrorem* upon the mind of an ordinary layman like Tobey, and, together with the show of force involved in the coming of *seven* officers and the display of badges of authority by some of them (fol. 40), to cow Tobey into submission.

Notwithstanding these facts, which, it is submitted, the record discloses are indisputable, it has heretofore been urged by the Government that the search and seizure were made with Tobey's acquiescence and without protest by him (fol. 52), as if the search and seizure had had his approval and consent. Such a suggestion ignores the exigent character of a demand by an officer of the law, armed with apparently valid process, and totally disregards the fear, which at once naturally arises in the mind of the plain man, who is rarely informed of his legal rights, when confronted with such a demand and the implied threat of force and disastrous consequences to him if he resist, which is plainly involved in official action with a force of seven men. The contention is, moreover, contrary to the clear holding of well-considered authorities. *Fitter* v. *United States,* 258 Fed. 567, 573-4 (C.

C. A.); *United States* v. *Abrams*, 230 Fed. 313; *United States* v. *Wong Quong Wong*, 94 Fed. 832, 833; *Herold* v. *Kahn*, 159 Fed. 608, 612 (C. C. A.).

Tobey has sworn that he requested the officers making the search to permit him to confer with the attorney for the Lumber Company, but that his request was refused (fol. 41); and his statement to that effect is confirmed by Brick, who was present at the raid (fol. 68). It is significant that it is not denied in any of the affidavits of the members of the raiding party (pp. 26-8), but only in the affidavit of one Munro, an employé of the company, who declares, not that such a request was not made, but that it was granted by the deputy marshal Moran and the permission not availed of (p. 29). The affidavit of Moran is in the record, but it is wholly silent upon this point (p. 27). The weight of the evidence and the balance of probability are clearly opposed to any such version of the transaction.

In an effort to show that the papers were voluntarily produced, Brick, who is the secretary and one of the salesmen of the Lumber Company, was induced by an assistant United States attorney to sign an affidavit to the effect that he had "made no objection to the removal of said books and papers" and "did not make any protest" to the United States attorney (fol. 53), but the circumstances under which he made this statement were uncontradictedly explained by him as follows (pp. 36-7):

> "Assistant District Attorney Mills insisted that I sign the affidavit in the form in which it was drawn. Before I signed it, I wanted him to put into the affidavit a statement to the effect that, at my suggestion, Mr. Tobey was about to telephone to attorney Lewis

T. Payne of North Tonawanda, and that one of the men, who took the books and papers, said, 'No, never mind an attorney, you can get an attorney when you get to Buffalo.' I also wanted to put in the affidavit, after the words, 'I made no objection to the removal of said books and papers,' something to the effect that I was not asked for any consent, and that I did not know that I had any right to such. He told me that those statements were not necessary in the affidavit, and that he did not want them, and requested me to sign the affidavit as drawn. I felt that I had to sign the affidavit, as drawn, and I did so. As far as it goes, it tells the truth, but it does not tell all of the truth.

"As a matter of fact, on February 25, 1919, at the time of the seizure of the books and papers in the office of the Silverthorne Lumber Company, Inc., I was not asked anything about consenting to the taking of any, and was not asked to produce any, and while I was present and could see what was going on, all of the books, papers and documents gathered up, were gathered up by the men who had come in the two automobiles, and I did not see Mr. Tobey or Mr. Munro, or any officer or any employee of the Silverthorne Lumber Company, Inc., get a single book, paper or document.

"I understood at the time that I was under restraint and subject to the orders of the men who had entered the premises, and that I was obliged to do as they said and to accompany them wherever they demanded. One of the men told me that I had to go with him, and for a time I was compelled to stay in one room."

The assistant United States attorney referred to by Brick has not made any affidavit controverting or explaining the foregoing.

Moreover, the District Court below found, as stated in its opinion, that the papers had "been seized under a subpœna *duces tecum*," that "after reading the subpœna, the marshal seized the books, files, papers and

memoranda of all kinds and had them conveyed to his office [in] Buffalo, and later to the office of the United States attorney," and that "there [had been] no voluntary production of the books and documents, as in *Perlman* v. *United States*, 247 U. S. 7."

It has already been pointed out that the requirements of the subpœna *duces tecum* (p. 29) were unreasonably broad and sweeping within the doctrine of *Hale* v. *Henkel*, 201 U. S. 43, 76, but the seizure of books, papers and documents, which the officers actually made under the color thereof and upon the pretense of effectually serving it, far exceeded even the broad terms of the process itself (fols. 46-47, pp. 30-36), and evidenced the reckless and lawless nature of the unreasonable search and seizure perpetrated. Appended to the affidavit of the United States attorney (pp. 25-6) is a list of books, papers and documents covering five closely printed pages of the transcript of the record herein (pp. 32-6), specifying 84 separately numbered *parcels* of papers, many of these, although designated by a single numeral, in fact consisting of a large number of letters, receipts and other papers, and all of them were expressly conceded by the United States attorney in the court below to be wholly irrelevant, immaterial and unnecessary to the investigation of the grand jury (fol. 47). Among the documents so unlawfully seized and carried away were the will of Mrs. Silverthorne, the mother of the individual plaintiff-in-error, over forty policies of life, fire, automobile, theft and other insurance, packages of receipts for premiums thereon, private papers of employés, promissory notes, releases, surety bonds, checks, private correspondence

of disinterested third parties, etc., etc. (pp. 32-6). In fact, the Lumber Company was so completely stripped and denuded of books, papers and documents that it was thereafter "compelled to carry its business transactions upon a pad" (p. 24), and rendered unable to conduct its affairs (fols. 30, 36, 42).

In addition to the books, papers and documents, there was missing from one of the Lumber Company's safes when the Silverthornes returned to the office on the afternoon of the day of the raid, a large amount of government bonds (fols. 30, 35, 37, 38). The safe door was wide open and a private drawer in it had been forced and looted (fols. 35, 38). The United States attorney declares that he knows nothing about the missing property (fol. 48), and the two members of the raiding party whose affidavits appear in the record (pp. 26-8) make similar disclaimers (fols. 50, 52). There is, however, no affidavit by any of the remaining four or five officers who participated in the raid, and the two affidavits referred to cannot be regarded as satisfactory proof that the bonds were not taken from the safe in one of the offices during the raid. Thus, Deputy Marshal Moran admits that he was absent from the office and in the company's yards a large part of the time and returned to the office only when the search and seizure were virtually completed (fol. 50); while his guard, a man named Waters, first arrived upon the scene after the others had been conducting the search for about half an hour (*cf.* fols. 49 and 51). In his affidavit Waters states "that no locks or drawers whatever were broken into or pried open in said offices while the said United States marshal

was therein on said 25th day of February, 1919" (fol. 52); but it is obvious that neither he nor Moran could truthfully make any sufficient assertion on this score of their own knowledge, because both of them were out of sight of the safes for considerable periods of time. It does, however, appear from Waters' affidavit that some articles were in fact removed from the safe (*id.*). Nor does it aid the Government to point to Munro's statement that "no locks were forced in desks or safes to deponent's knowledge" (fol. 54). There were five different rooms in the offices in which books, papers and documents were kept (fol. 40), and it does not appear that Munro knew, or even could know, what each of the six or seven members of the raiding party were doing in each of these rooms during all the time they were there.

It is only fair to add that some of the property at first believed to be missing has since been accounted for; but a most diligent search by the Silverthornes has failed to find a large part thereof, namely, twenty-five thousand dollars of Liberty Bonds. It may, of course, be possible that this property was taken from the Lumber Company's premises by some stranger after the search and seizure on February 25th, when the place was emptied of all its occupants by the marshal and his party and left deserted, open and unlocked; but even that assumption can serve only to emphasize the reckless spirit and lawless indifference to the rights of others with which the marshal and his helpers proceeded in their raid on behalf of the Department of Justice of the United States.

Although the matter does not appear in the record, it

may be mentioned, since it has already been referred to in this court by the Government (*vide* additional brief on motion to dismiss or affirm, p. 4), that a proceeding before a special master to inquire into the disappearance of the bonds was dismissed without prejudice on May 10, 1919, for failure of the Lumber Company's counsel to proceed. The inability of the company to prove that the property had not been stolen after the raiding party had left, the pendency of numerous civil and criminal proceedings by the Government against the company and its president and general manager and the necessity for constant action therein, the difficulty which the Silverthornes and the company were experiencing in procuring third persons to consent to be witnesses for them since Tobey and Brick had been indicted as co-conspirators immediately after they had executed affidavits in behalf of the Lumber Company (pp. 8-14), and other considerations of obvious practical expediency, made it seem advisable to the counsel for the company to submit, for the time being, to a dismissal of the proceeding without prejudice. This dismissal *without prejudice* is now sought to be availed of as a virtual concession!

The marshal and his assistants delivered the seized books, papers and documents to the United States attorney immediately after the raid on February 25th, and the latter at once presented them to the grand jury, and then had them immediately copied and photographed and notes and memoranda made therefrom (fols. 29, 41, 46-7, 72-3). On February 27th, two days after the search and seizure and one day after the Silverthornes had learned from Tobey what had occurred (fol. 37), their

attorney, Mr. Killeen, demanded of the United States attorney, the marshal, the clerk of the court and the foreman of the grand jury the return of the seized books, papers and documents, but was refused (fol. 44). Thereupon the Lumber Company filed a petition for the return of the books, papers and documents, and on February 28th obtained from the District Judge an order requiring the United States attorney and others to show cause why the Lumber Company should not have the relief prayed for in its petition (pp. 15-24). On March 6th the court made an order granting the petitioner's application (pp. 37-39), thus overruling the Government's contention that the subpoena *duces tecum* had been duly served and executed and the books and papers in question produced thereunder by the company with the consent and acquiescence of its servants, and not by an unlawful and unreasonable search and seizure, and finding, on the contrary, that (fol. 72)—

> "It satisfactorily appears to the court that the books, papers, memoranda, property and effects were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpœna *duces tecum*, in violation of the constitutional rights and privileges of the petitioner."

This order was not subject to review by the Government or the United States attorney in any court or in any manner (*United States* v. *Sauges*, 144 U. S. 310; *Wise* v. *Mills*, 189 Fed. 583—C. C. A.; *Wise* v. *Mills*, 220 U. S. 549; *Wise* v. *Henkel*, *id.* 556); and there has been no attempt to appeal therefrom. The order is, therefore, plainly entitled to conclusive force and effect in the case at bar. Nevertheless, in the Government's briefs herein

upon the motion to dismiss or affirm, an attempt was in effect made to review the order by repeatedly calling into question the fact that the Lumber Company had been wrongfully and unlawfully subjected to force, threats, trespass, invasion of privacy and governmental extortion of books and papers, which the order necessarily adjudicates and conclusively determines. *Perlman* v. *United States*, 247 U. S. 7, 13.

Prior to the entry of the order directing the return of the books, papers and documents, the United States attorney petitioned the court to impound all those which he believed to have a bearing upon the case (pp. 39-41 and 30-31). The Lumber Company opposed this application, pointing out, in addition to the foregoing facts, that it would be unable intelligently or effectively, if at all, to carry on its business if deprived of the books and papers in question (fols. 82, 86, 89, 93). The motion to impound the original papers was thereafter denied (fols. 94-5), but notwithstanding this denial, the court ordered that the photographs and copies of the books and papers and notations concerning them should be impounded and left in the possession of the clerk of the court (fol. 73). There they still remain, available in the pending prosecution, and the representatives of the Government have thereby secured the evidence they desire, and the object of the raid has been thus accomplished.

After the application to impound had been disposed of, the United States attorney returned to the Lumber Company some, but not all, of the books, papers and documents which had been seized and removed on Feb-

ruary 25th (fols. 112, 121, 152, 179, 197-8). The United States attorney and his assistant, neither of whom was present at the raid and neither of whom can know all that was actually taken, declare that they have returned all the books, papers and documents in their possession (fols. 47-8, 133-4). What has become of the rest no one appears to know, and, as the marshal and his raiding party gave no list, receipt, or account of what they seized (fols. 29, 40-1), it is impossible to set forth with precision everything that was seized and removed.

Two days after the court had ordered the return of the seized books and papers, and on March 8th, the United States attorney caused six subpœnas *duces tecum* directed to the Lumber Company to be served upon its employé Tobey requiring the production of books, papers and documents before the grand jury (fols. 112-3, 121-2). These subpœnas collectively called upon the company to produce all the books, papers and documents which had been illegally seized and recently returned, except those which the United States attorney had previously conceded to be immaterial (pp. 48-54, 61). As he had acquired specific knowledge of the books and papers described in the subpœnas during the nine days that he unlawfully detained them, he was now able to refer to and identify them in the subpœnas with particularity (fol. 123). The Lumber Company at once moved to quash the subpœnas, and thereupon, after argument, the United States attorney withdrew the subpœnas in open court (pp. 55-66, fols. 154, 180-1).

On March 11th the grand jury found an indictment against the Lumber Company, Frederick W. Silver-

thorne, Asa K. Silverthorne, Tobey, Brick and one Cannon, charging them with conspiring to defraud the United States by falsely billing the federal authorities in control of the Erie Railroad for more grain door boards than had in fact been delivered to it (pp. 8-14). The indictment was clearly the result of the prior presentation to the grand jury of the books, papers and documents theretofore unlawfully seized and subsequently ordered returned (fols. 46-8, 125, 158-9).

On March 21st the United States attorney again caused six subpœnas *duces tecum*, in the same form as those theretofore withdrawn by him, to be issued, directed to the Lumber Company and requiring it to produce books, papers and documents before the grand jury (pp. 66-73, fol. 181). These subpœnas, considered collectively, called for the production of practically all of the company's books, papers and documents, including all those seized on February 25th, except those which the United States attorney had declared to be immaterial and unnecessary and whose return he had not resisted (fols. 47, 153, 155-6). The Lumber Company had been engaged in business five years (fol. 160), and all its business transactions were recorded in the books and papers required to be produced (fol. 156). Compliance with the subpœnas would, therefore, have disabled it in great measure from continuing in business (*id.*).

The six last mentioned subpœnas were not properly or lawfully served upon the plaintiffs-in-error. Copies of the subpœnas were merely delivered to Mr. Killeen, one of the counsel for the Lumber Company but not an officer or director thereof. The original subpœnas were

not exhibited to him, nor was any statement made by the marshal attempting to serve the papers concerning the contents thereof (fols. 156, 205). The service upon Frederick W. Silverthorne was equally insufficient. The deputy marshal merely deposited in front of him a package consisting of copies of the subpœnas, but did not exhibit the originals, nor make even the slightest effort to communicate their contents to him (fols. 174, 199, 202-3, 210). The returns of the marshal concerning the service of these papers allege only that he delivered copies of the papers and did nothing more (fols. 238, 241, 243-4, 247, 250-1, 253-4).

The Lumber Company immediately and on March 22nd petitioned and moved the court to vacate and set aside the subpœnas (pp. 73-80). Its petition set forth the facts hereinbefore recounted, and referred particularly to the unlawful search and seizure of books, papers and documents to which it had been subjected on February 25th, the improper detention of the books, papers and documents for the purpose of learning their contents and description, the unjust presentation of this evidence to the grand jury and their action thereon in indicting the company, and the continual effort of the United States attorney since the unlawful raid to secure by indirection and the use of the process of subpœna the benefits and fruits of the prior unlawful search and seizure (pp. 74-80, see also pp. 85-94). The main grounds of objection to the subpœnas specified in the petition (fols. 160-2, see also fols. 185-8) may be summarized as follows:

(1) That, as the books, papers and documents called

for in the subpœnas had been unlawfully seized by government officials, examined, copied and photographed by them, advantage of such unlawful search and seizure and of the knowledge thus unlawfully procured, could not thereafter be secured by compelling the party aggrieved to produce the books, papers and documents under subpœna *duces tecum* after the court had ordered their return, since such compulsory production would, in substance and effect, nullify the aggrieved party's rights under the Fourth Amendment to the Constitution;

(2) That, although in terms limited as to time, the six subpœnas *duces tecum* collectively were still in effect unreasonable and illegal since they actually required the production of practically all of the company's books, papers and documents pertaining to its active business, and thus constituted an unreasonable search and seizure in violation of the terms of the Fourth Amendment to the Constitution, and

(3) That the compulsory production of the Lumber Company's books, papers and documents in a case charging a crime wholly unrelated to any federal right, privilege or franchise exercised by the company, would tend to incriminate it in violation of its rights under the Fifth Amendment to the Constitution.

On March 25th the court denied the Lumber Company's application to set aside the subpœnas *duces tecum* and directed it to comply therewith (p. 81). This order was served on one of the company's counsel, Mr. Moore, but was never served upon the individual plaintiff-in-error Frederick W. Silverthorne (fols. 171, 175).

On March 28th the United States attorney procured from the court a rule requiring the plaintiffs-in-error to show cause why they should not comply with the subpœnas *duces tecum* or be punished for contempt (pp. 82-5). In response thereto the Lumber Company filed a separate answer setting forth in detail the foregoing facts, repeating its aforesaid objections to the compulsory production of its books, papers and documents, and asserting its constitutional rights, privileges and immunities under the Fourth and Fifth Amendments to the Constitution (pp. 85-97). The plaintiff-in-error Frederick W. Silverthorne also filed a separate answer averring that the subpœnas had not been duly served upon him and stating the circumstances in that regard, which have already been mentioned (pp. 98-9). Acting in good faith and under the advice of counsel, earnestly protesting their respect for the court and its orders, the plaintiffs-in-error declined to produce the books, papers and documents, solely for the purpose of creating a record which would enable them, if punished for contempt, to have a prompt determination by this court of the grave constitutional questions herein involved before they were subjected to the jeopardy and expense of a trial, which, in the end, if they were right in their views, would be but a needless and ruinous hardship to them (fols. 171, 189-92, 213). Contrary to the suggestion of the Government in opposing Mr. Silverthorne's application for bail (brief, p. 5, October Term, 1918—No. 996), there was nothing contumacious in their attitude, and the procedure adopted by them was in strict accord with the rules laid down by this court in *Alexander* v. *United States,* 201 U. S. 117, 121-2, and *Nelson* v. *United States, id.* 92, 98.

On April 1st the court adjudged both plaintiffs-in-error to be in contempt, fined the Lumber Company and committed the plaintiff-in-error Frederick W. Silverthorne to jail (pp. 103-4). The next day they sued out a writ of error to this court to review the judgment of contempt (pp. 110-13), assigning a number of errors (pp. 107-10) intended to raise and present substantially the following questions, viz.:

I. Whether prosecuting officials of the United States, after having wrongfully raided the offices of an individual or corporation in order to obtain knowledge and discovery of private papers through illegal search and seizure in violation of constitutional rights, can nevertheless consummate and secure the full benefit of their wrong by subsequently compelling the production under a subpœna *duces tecum* of the papers thus searched for and seized. Assignments first, second, fourth and fifth —fols. 218-20, 221-2.

II. Whether the subpœnas *duces tecum* herein in question do not collectively constitute an unreasonable search and seizure within the prohibition of the Fourth Amendment to the Constitution of the United States in view of their sweeping character and scope. Assignments third and fifth—fols. 221, 222.

III. Whether a private state trading corporation, when itself subpœnaed to produce its own private records in a criminal case directed against it involving no federal right or franchise whatever, is entitled to plead the immunity from self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States. Assignments sixth and seventh—fols. 222-3.

IV. Whether any person can be lawfully punished and imprisoned in a contempt proceeding for disobedience of a subpœna *duces tecum* when such subpœna was not legally served upon him. Assignment tenth—fol. 224.

I.

As to the Lumber Company's rights under the Fourth Amendment to the Constitution of the United States.

It is submitted that there is no longer any doubt that a corporation is protected by the guaranty of the Fourth Amendment against unreasonable searches and seizures in as full a measure as any natural person. *Hale* v. *Henkel*, 201 U. S. 43, 75-76; *In re Tri-State Coal & Coke Co.*, 253 Fed. 605; *United States* v. *McHie*, 194 Fed. 894, 898; *United States* v. *McQuade et al.*, U. S. D. C., E. D. N. Y., Thomas, D. J. (not yet reported); *Coastwise Lumber & Supply Co.* v. *United States*, 259 Fed. 847, 849. As Mr. Justice Brown said for the court in *Hale* v. *Henkel*, *supra:*

> "Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property

> cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf, &c., Railroad Company* v. *Ellis*, 165 U. S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."

It should be plain that a group of individuals trading in a corporate capacity have, and must have, the same constitutional rights of liberty, privacy and security in respect of their "houses, papers and effects," as they would have if they were unincorporated partners. *In re Pacific Ry. Com'n.*, 32 Fed. 241, 265. The same considerations of fundamental policy which protect corporations in their property and guaranty them the equal protection of the laws, liberty and due process of law, operate to preserve them from the oppression and lawlessness that inhere in an illegal and unreasonable search and seizure of private papers and effects by a public official. An orderly constitutional government can require of its officers and grant to its citizens no less. As stated by the Circuit Court of Appeals in *Veeder* v. *United States*, 252 Fed. 414, 418 (certiorari denied, 246 U. S. 675):

> "One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.
>
> "One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant."

In the case at bar the officers who perpetrated the

search of the Lumber Company's premises and the seizure of its books, papers and documents, were armed with no search warrant or other process which purported to authorize any of them to make any search or seizure whatever. They did not even hold an invalid search warrant. All that they had was a void subpœna *duces tecum;* and, under the color of that, they ransacked the company's premises and stripped it of all its books, papers and documents and carried them away. A subpœna *duces tecum* may never be served or executed in any such manner. *Hale* v. *Henkel*, 201 U. S. 43, 80; *Elting* v. *United States*, 27 Ct. Cl. 158, 164, 166; *Banks* v. *Connecticut Ry. & L. Co.*, 79 Conn. 116, 118. "The service of a subpœna," as declared by Mr. Justice McKenna in *Hale* v. *Henkel, supra*, "is but the delivery of a paper to a party—is open and above-board. There is no element of trespass or force in it. It does not disturb the possession of property." It gives no "right to search [another's] house, or open his safe, or ransack his papers," or to behave as though one held, not a mere writ of subpœna, but a writ of replevin (*Elting* v. *United States, supra*). Nevertheless, in the case at bar, as the court below has conclusively found (fol. 72), "the books, papers, memoranda, property and effects [of the Lumber Company] were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpœna *duces tecum*, in violation of the constitutional rights and privileges of the [company]," when seven officials of the United States invaded its office, subjected the men in charge to duress, searched the premises and removed every paper or writing in the place. The pretext for this high-handed and

lawless raid in force was that the United States attorney had instructed the marshal to *serve* a subpœna *duces tecum!*

It must not be assumed that this conduct was a mere excess of official zeal on the part of minor functionaries. On the contrary, it was deliberately planned and carefully executed, certainly with the knowledge of the United States attorney and probably under the direction of his office (fol. 31), and it was so timed that it might occur while both the president and general manager of the company were being detained under arrest by federal officers in Buffalo, twelve miles away from and out of reach of the office of the company. And no sooner had the documents been seized than they were taken to the office of the United States attorney, who apparently was expecting them and prepared to have them all immediately examined, sorted, copied, noted and *photographed,* as well as at once presented to the grand jury. *Flagg* v. *United States,* 233 Fed. 481, 482-3—C. C. A. The object of the outrage was then fully accomplished, and complete knowledge and discovery thus wrongfully obtained of alleged incriminating private documents.

Manifestly this case presents another illustration of the constantly increasing "tendency which has grown up [among prosecuting officers] to proceed by 'raid' of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution" (*United States* v. *Friedberg,* 233 Fed. 313, 318); and the question involved herein is whether, after having perpetrated such a wrong, prosecuting officers can, nevertheless, consummate and secure

the full benefit and fruits thereof by subsequently returning the papers seized and then immediately compelling their production anew under subpœna *duces tecum* by the party wronged.

Plainly, if this procedure is to be tolerated, it would in effect nullify the protection of the Fourth Amendment and place a premium upon lawless and unconstitutional official conduct. Surely the Government of the United States can enforce the criminal laws of Congress without violating the Constitution. To argue, as does the Government in substance and effect, that since the books, papers and documents were returned, the protection and immunity which the Fourth Amendment was intended to guarantee against violation were fully satisfied, and that the documentary evidence thus illegally seized, disclosed and identified could thereafter be lawfully called for under a subpœna *duces tecum* and the company compelled thereby to bring it into court, despite the fact that information and discovery of the documents had been obtained only by a deliberate violation of a constitutional guaranty against unreasonable searches and seizures, is to seek the sanction and approval of this court of an official practice plainly calculated to encourage deliberate circumvention and cynical disregard of a fundamental constitutional right. If the procedure adopted in this case is to be now approved or permitted to bear fruit and be consummated, similar outrages are certain to continue and multiply. Illegal searches and seizures will then be made whenever a prosecuting officer desires information in the possession of any individual or corporation; a subpœna *duces tecum* will be served and immediate search

and seizure made; the evidence thereby obtained will be examined, copied and photographed; the documents will then be *pro forma* returned, but their production will at once be again compelled by means of a subpœna *duces tecum* fully naming and identifying the documents. If such a subterfuge be now held lawful, the Fourth Amendment of the Constitution will become vain and futile as a principle and guaranty of liberty and security.

The Fourth Article of Amendment to the Constitution of the United States does not deal with any question of mere procedure, but with an affirmative and substantial right. Its prohibition is not, therefore, to be evaded, nor its guaranty satisfied, by merely formal deference to its terms. Its plain intent was expressly to forbid and *effectually* to prevent unreasonable searches and seizures. It follows, therefore, that a due regard for its terms, its spirit and its purpose requires that no officer sworn to uphold the Constitution and no department of the Government created under the Constitution, shall reap an advantage from the violation and substantial denial of the terms of this part of the Constitution. If, unmindful of the solemn pledge and restraint under which the Fourth Amendment lays the Government and all its officials, and none more particularly than those connected with the Department of Justice, a person is, nevertheless, subjected to an illegal search and seizure, the plainest considerations of justice and constitutional morality require that no prejudice shall be permitted to befall the wronged individual as a consequence of such unlawful search and seizure, and that amends be made him sufficient to restore him as nearly as may be to the position he occu-

pied before he was subjected to the unconstitutional search and seizure of his private papers. Merely returning the papers seized, only to recall them again by the process of subpœna, and employing the information wrongfully extorted by search and seizure, to the detriment of the aggrieved individual, are plainly not restoring the injured party to the *status quo*, nor adequately respecting the positive prohibition and guaranty of the Fourth Amendment. "This is varying the form without varying the substance" of the wrong, and "it is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing" (*Brown* v. *Maryland*, 12 Wheat. 419, 444). It is forgetting that "the Constitution deals with substance, not shadows," that "its inhibition was levelled at the thing, not the name," that "the provisions of the Federal Constitution intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted," and that "if this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure," and "no kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected" (*Cummings* v. *Missouri*, 4 Wall. 277, 325, 329).

The principles enunciated in the authorities fully sustain these propositions. *Weeks* v. *United States*, 232 U. S. 383; *Flagg* v. *United States*, 233 Fed. 481 (C. C. A.); *Fitter* v. *United States*, 258 Fed. 567, 574-5 (C. C. A.); *In re Tri-State Coal & Coke Co.*, 253 Fed. 605, 608; *United States* v. *Moun Day*, 208 Fed. 186; *United States*

v. *Wong Quong Wong*, 94 Fed. 832; *United States* v. *McQuade et al.*, E. D. N. Y., Thomas, D. J. (not reported); *State* v. *Sheridan*, 121 Iowa 164, 166-8.

In the case of *Weeks* v. *United States, supra*, this court set aside a conviction which was in part founded upon evidence procured by means of an unlawful search and seizure. The purpose, intent, scope and effect of the Fourth Amendment were then most carefully reviewed, and Mr. Justice Day, speaking for the unanimous court, said (at pp. 391, 393):

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . .
>
> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no

warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial. . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused. In *Adams* v. *New York*, 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it.

(*Boyd Case, supra.*) To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

The Circuit Court of Appeals of the Second Circuit, in a very carefully prepared opinion, *Flagg* v. *United States*, 233 Fed. 481, considered a case involving facts similar to those in the case at bar and arrived at a conclusion which fully supports the contention of the plaintiffs-in-error. In that case the defendant Flagg's papers had been illegally seized by the Government without a search warrant, had been examined by the government officials, and then sometime later had been returned to him after they had fully served the purposes of the Government, although he had immediately after the seizure demanded their restoration. It is true that no subpœna *duces tecum* had been issued to require him to produce the seized documents; but the officials of the Government in that case could accomplish their purpose and reap the benefit of their wrongful act by utilizing what they had learned from the seized writings and producing the secondary evidence they had secured therefrom. The conviction was reversed, Circuit Judge Coxe saying (pp. 482, 484, 486):

"The defendant insists that his books and papers were taken possession of by the postal authorities of the United States under the direction of the Department of Justice without process or legal authority of any kind. This matter might have been made perfectly clear but it has been left largely to inference and conjecture. Who the police officers were, where they got their orders, who the United States official was who apparently was directing the so-called 'raid' does not satisfactorily appear, but it does appear that the papers and books were all

carted to the federal building where they remained for several years and where the government officials worked over them for 18 months, although the defendant applied for their return September 26th, 3 days after they were seized. Some conclusions may be left to presumption, and it is impossible to believe, in the face of these facts, that the United States, acting through its accredited agents, was not responsible for the arrest of the defendant and the seizure of his property. To attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen or to some unknown parties, in the face of the fact that the property was immediately carted to the federal courthouse and remained there till the federal officials had obtained all the information desired, makes too severe a demand upon the imagination.

"The fact that the government officials returned the books after they had worked over them for a year and a half and had obtained all the information possible, is not of the least importance in considering the question of the initial illegality. We have, then:

"First, a seizure of the defendant's books and papers without warrant or legal process of any kind —an unlawful entry and an unlawful taking.

"Second, a presumption, well nigh conclusive, that the United States, whose agents took the books and papers into custody, and who alone was interested in prosecuting the defendant, was the party who made or instigated the unlawful seizure through its agents and servants.

"The question then is reduced to this—can a party be convicted of a crime upon proof procured from books and papers which have been taken from him by force and without a pretense of legal authority?

"Will the people be secure in their persons, papers and effects if seizures and searches made without pretense of legality are sustained by the courts?

. . . . . .

"The case of *Adams* v. *New York*, 192 U. S. 585, differs from the case at bar in many important particulars but chiefly in the essential feature that in

that case a valid search warrant was issued and incidentally the letters were seized in executing it. Had there been such a warrant issued on proper proof by competent authority in the case at bar the defendant's contention that the seizure of his property was unlawful, wanton and in violation of his constitutional rights might have been unavailing. Such a warrant issued by a court or magistrate having jurisdiction protects the officer executing it even though he may transcend his authority; but did the court intend to hold that a naked trespasser may seize the entire business including the books and papers of another and use them to convict him of a crime? We think not. To hold such a proposition is to give judicial sanction to a wholly illegal proceeding and make the necessity for a search warrant unnecessary. If parties without authority may enter another's place of business and carry away all his books and papers and use them in criminal proceedings against him, the constitutional amendments and the laws passed to prevent such invasions of his rights become dead letters. There are numerous cases which hold that where an officer executing a legal search warrant seizes property, not mentioned in the warrant, which may properly be considered in evidence, the right to introduce it is not lost by reason of its unlawful seizure, but we know of no case where a conviction has been sustained upon evidence obtained by such methods as were here employed. The *Adams* case proceeds upon the theory that having a legal right to search for property relating to the offense charged, such property will not be excluded from evidence because it is not specifically mentioned in the search warrant. Nowhere in the opinion is there any sanction for the proposition that one man may enter another's home, seize all his books and papers without process and procure his indictment and conviction upon the proof so obtained. In every case, so far as we are able to discover, where the court has permitted evidence taken from the defendant to be used against him it was obtained by legal methods—a search warrant issued by the court or judge. . . .

"The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The information illegally obtained was in the posession of the United States attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' and were not concerned about the disposition of the 'primary evidence.'

"We do not deem it necessary to discuss all the questions mooted on the briefs relating to the admission and exclusion of evidence at the trial. We prefer to rest our decision upon the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States acting without warrant or pretense of legal authority."

In *Fitter* v. *United States*, 258 Fed. 567, 574-5, the same court sustained a conviction where there had been an illegal search and seizure only because it clearly appeared that "the papers and book which the officials of the Government took into their possession were not used at the trial by the Government or in preparation therefor," that "the trial judge was very particular that no evidence should be received which was derived by the Government from any paper or book which the Government had taken into possession by the illegal seizure," and that "the United States attorney stated that the book and papers which the government officials illegally took into their possession were of no value in the prosecution of the case and in procuring the necessary evidence."

In *United States* v. *Wong Quong Wong*, 94 Fed. 832, 834, the court said that—

> "These constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use. The cases cited show that they cover the use of papers or testimony when it would be carrying out their violation."

In *United States* v. *McQuade et al.*, before District Judge Thomas in the Eastern District of New York (not yet reported), the papers of a corporation had been unlawfully seized under an invalid search warrant. (See *Coastwise Lumber & Supply Co.* v. *United States*, 259 Fed. 847—C. C. A., where the facts and history of this case appear.) The Government succeeded in deferring the hearing of an application for the restoration of the papers until the cause came on for trial, and then sought to have the benefit of the seized evidence. The proof was excluded, the court saying in part:

> "I am not one who believes that the Government can by such sharp practices take advantage of its own wrong and having thus secured possession of the papers, no matter how guilty they be, use them in violation of prescribed law; the proposition is too repugnant to allow such things to go without check.
>
> . . . . . .
>
> "Herein I have endeavored, successfully or unsuccessfully, to convince those charged with this prosecution that whatever difficulties may now be presented as the result of this ruling have not been brought down upon them by the court, but that the present difficulty is due to a failure to observe the provisions of the law under which this seizure was attempted, and that discharging my duties as I judge them to be, *the evidence thus obtained must be ex-*

cluded and the information derived from the seized papers also is inadmissible in evidence upon the trial.''

In *In re Tri-State Coal & Coke Co.*, 253 Fed. 605, 608, two corporations had been subjected to an illegal search and seizure. The court directed, not only that the books and papers actually seized be returned, but also that "all copies, photographs, or memoranda thereof, made since the same were taken" should likewise be returned. Thus, in that case the court plainly regarded the constitutional rights of the corporations as requiring the restoration of the *status quo* and the protection of the corporations in every respect possible against any prejudice from the wrongful search and seizure. This practice is in striking contrast to that pursued by the learned court below in the case at bar, who not only impounded the copies and photographs, but sought, in addition, to enable the Government to consummate and secure the full fruits of the illicit search and seizure by coercing the Lumber Company and its president, under threat of punishment for contempt, to bring back into court the seized and restored books, papers and documents.

Nothing inconsistent with the contentions of the plaintiffs-in-error was decided in the case of *Adams* v. *New York*, 192 U. S. 585, heretofore relied upon by the Government. It will be recalled that immediately after the unlawful search and seizure the Lumber Company at once demanded the return of its papers and made seasonable application to the court for that relief (pp. 15-24). It did not wait until its trial upon a criminal charge, and then attempt to procure the exclusion of the evidence upon an objection that it was incompetent because ille-

gally obtained, and thus interject into the trial a wholly confusing collateral issue, as did the defendant in the *Adams* case. On the contrary, it followed the procedure distinctly approved by this court in *Weeks* v. *United States,* 232 U. S. 383, 396, and promptly demanded of the court below that it undo the wrong which officials of the United States had perpetrated.

Again, in the *Adams* case the officers were armed with a *valid* search warrant and had, therefore, the right to search the defendant's premises for some purposes; while in the case at bar the officers had merely an invalid subpœna *duces tecum,* which they were, of course, entitled to serve, but under which they had no right whatever to search the company's offices for any purpose.* It is, moreover, quite plain in the case at bar that the use of the subpœna by the raiding party was merely colorable, and that their real purpose and intent were to search the Lumber Company's offices and seize its papers without any legal search warrant or other due process of law. Seven men and two automobiles are not ordinarily sent to *serve a subpœna.* No such force was employed by the Government in serving the subsequent subpœnas upon the plaintiffs-in-error now before the court. Nor does an official ever assume any responsibility for the execution of the command of the subpœna; that duty rests solely upon the witness subpœnaed; and the witness has a right, *before the subpœna is finally enforced,* to challenge it and have a judgment of the court upon his challenge. *Hale* v. *Henkel,* 201 U. S., 43, 80. It is obvious

* See *Weeks* v. *United States,* 232 U. S. at pp. 394–6, and *Flagg* v. *United States,* quoted above, where the *Adams* case is thus distinguished.

that the invalid subpœna in the case at bar was a mere pretext and intended for use only as a cloak for unlawful and unconstitutional official conduct, and that the United States attorney and his subordinates knew it was void, and therefore did not intend or desire the ordinary course and procedure to be followed by the marshal in respect thereto, but, on the contrary, intended and desired the subpœna to be employed only as part of the machinery or the excuse for the unlawful search and seizure. The case at bar must, consequently, be considered, as is in effect the fact, as if the marshal had acted without any subpœna at all.

In the *Adams* case the search was lawful and the documents there in question were obtained merely as an incident to an otherwise lawful act. But in the case at bar the search was a pure trespass and wholly unlawful, and the seizure, therefore, plainly an extortion of private papers by force and without due process of law.

These observations make clear the complete want of merit in the suggestion, heretofore made by the Government in its additional brief on the motion to dismiss or affirm (p. 5), that—

> "The effect of the position of the plaintiff-in-error is that although the last series of subpœnas call for the production of papers which the defendant corporation is not privileged to decline to produce, *if the information upon which such subpœnas are based has been acquired by the use of other subpœnas which have been quashed as too indefinite or otherwise illegal,* the Government is estopped from requiring the production of the testimony by regular and sufficient subpœnas."

With all deference, it must be pointed out that this is hardly a fair statement of the effect of the contentions of

the plaintiffs-in-error and that it omits all reference to the unlawful search and seizure to which the Lumber Company was subjected. No such contention has been advanced in behalf of the plaintiffs-in-error. Nor is it fair to assert that the information upon which the final subpœnas were based was "acquired by the use of other subpœnas which have been quashed as too indefinite or otherwise illegal." The information was not, in any fair and reasonable sense, acquired by means of the first subpœna *duces tecum* at all; it was acquired solely by means of the illegal use of force and by an actual, not merely a constructive, unlawful search and seizure. The original subpœna *duces tecum* was not served in the usual manner and the books, papers and documents were not thereupon produced in court *by the witness* thereunder. On the contrary, the officials never afforded Tobey even an opportunity to comply or refuse to comply with the subpœna or to produce anything; they subjected him to duress, and at once proceeded themselves to seize and carry off every scrap of paper in the offices, including even hundreds of instruments which concededly had no bearing on the case and which manifestly Tobey would never have produced, since even the latitudinarian terms of the first subpœna did not cover them.

Indeed, the situation suggested in the foregoing extract from the Government's prior brief can never practically arise. If an indefinite subpœna *duces tecum* is served upon an individual or corporation and, notwithstanding that fact, the witness sees fit to produce books and papers in response thereto, such production is plainly a waiver of any right to object to the undue scope

of the writ. There is then not even a constructive illegal search and seizure, since the production is wholly voluntary. No further subpœna need then be issued; the Government already has the papers, and the person subpœnaed having given them up freely and without objection or duress, cannot have them restored. If, on the other hand, the party subpœnaed does not comply, but instead moves to quash the writ because it is too broad, and the motion is granted, the papers do not come into the hands of the Government at all, and it cannot, therefore, derive any information from them to enable it to draw better subpœnas thereafter. If it serve subsequent subpœnas in such a case, it is manifest that they are not based on improperly obtained information. But neither of these instances bears any resemblance to the case at bar, where information was obtained, not by any proper use of the process of subpœna, but by direct and wrongful violation of the company's constitutional right to be secure against unreasonable searches and seizures, as the court below found when it ordered the seized books, papers and documents to be returned.

The consequences of the Government's contention should be clearly appreciated. If its course in this case be lawful, the right to be protected against unreasonable searches and seizures would be a vain and empty constitutional guaranty. All that would then be necessary to evade a fundamental and constitutional right would be to arm the officers who are to make the search and seizure, *i. e.*, to conduct the raid, with a totally void subpœna *duces tecum* and have them serve the invalid writ in force at the same time that they forcibly carry off every paper

and book they find. Then after the papers had been copied and photographed, they could be restored to their owner. Their production could thereupon be again secured by properly drawn subpœnas, if they belonged to a corporation; or the secondary evidence alone presented to the court, if the defendant were a natural person; and in both cases the knowledge wrongfully procured could be used to the detriment of the party aggrieved. If that be sound doctrine, nothing of substance was in reality determined by this court in the *Weeks* case; the unanimous and solemn pronouncement then made only regulated a minor matter of form and procedure. It follows from the contention now advanced by the Government that if the marshal in that case had held a wholly void subpœna *duces tecum* when he seized the accused's letters, and if the United States attorney had returned the letters after photographing them, and then proved at the trial that the originals were in the defendant's possession and the photographs were accurate copies, the conviction would have been allowed to stand. The logical and necessary consequences of this doctrine or theory must sufficiently show it to be erroneous. It would enable a mere procedural circumlocution to evade and destroy the substance and spirit of a fundamental guaranty of liberty and security.

The fact that in the present case the court is dealing with subpœnas *duces tecum* whose purpose it is to consummate and reap the advantage of the unlawful search and seizure, while in the *Weeks* case it considered the admissibility of evidence offered with the same purpose in view, does not differentiate the two cases. On the re-

turn of the final subpœnas the corporation in the case at bar had the opportunity and duty to assert its constitutional right and thus promptly move to frustrate the effort to accomplish the wrong initiated by the unlawful search and seizure. The company was under no duty to delay until trial for relief and meantime allow its records to become the basis of an indictment by the grand jury. It was entitled to adopt the course that would soonest and at smallest expense and hardship protect its rights and liberties.

It is, of course, no answer to these contentions to urge that the individual or corporation subjected to an unlawful search and seizure has a remedy against the officer by an action at law for damages. That remedy is in nearly every instance wholly inadequate, and the damages sustained are almost invariably beyond possibility of legal admeasurement. It would be but a travesty of justice to remit the plaintiffs-in-error in the case at bar to an action against the irresponsible members of the raiding party. Moreover, if there were any virtue in the suggestion, this court would have applied it in the *Weeks* case, but instead it declared (232 U. S. at p. 394):

> "In *Adams* v. *New York*, 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. (*Boyd Case*, [116 U. S. 616].) To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

It should furthermore be noted that the Lumber Company had existed for nearly five years at the time when the final subpœnas in this case were issued (fol. 160), and was then and always had been actively engaged in carrying on a large lumber business. Substantially all its business affairs and transactions were recorded in the books and papers called for by the six subpœnas served upon it (fol. 156). It is contended that the periods of time mentioned in the subpœnas in fact accomplish no substantial reduction in the quantity of material to be produced. There was no proof to show that all this large mass of records was necessary, and it plainly appears that the business of the company could not continue to be carried on if it were denuded of all its records (fol. 156). The subpœnas themselves, therefore, constituted an unlawful search and seizure, within the settled rule laid down in *Boyd* v. *United States*, 116 U. S. 616, and *Hale* v. *Henkel*, 201 U. S. 43, 76-77, because "far too sweeping in [their] terms to be regarded as reasonable."

It has heretofore been insisted by the Government that this court sustained a subpœna *duces tecum* of like sweeping scope in *Wheeler* v. *United States*, 226 U. S. 478. In that case, however, the company affected by the subpœna had been dissolved and was long out of business, and, therefore, could not be seriously, or at all, affected by having its books and papers taken before the grand jury. Again, in that case the corporation itself made no objection to producing the records and did not assert any constitutional right in respect thereto, and finally, there was "nothing to show [that the subpœna there involved] was so broad as to be objectionable" (p. 489). The

Wheeler case is, therefore, clearly not a precedent in the case at bar.

However, in the case at bar the principal question under the Fourth Amendment is whether or not officials of the United States can deliberately violate the rights of individuals by wrongful searches and seizures without warrant of law in order to obtain knowledge and discovery as to the existence and contents of all the private books and documents of an accused, and, having thus wrongfully obtained the discovery and been thereafter compelled to return the books and documents, nevertheless, secure full benefit from the wrong by means of subsequent subpœnas *duces tecum* or otherwise. The answer to that question cannot be at all doubtful provided the doctrine of the *Weeks* case and those that have followed it, cited *supra*, is to be maintained unimpaired. If government officials can avail of their own wrong, notwithstanding and in defiance of the emphatic admonition of this court in the *Weeks* case, the constitutional guaranty against unreasonable searches and seizures will have been rendered practically nugatory as to both individuals and corporations and will exist in fact hereafter only at the sufferance of public officials.

II.

As to the rights of the Lumber Company under the Fifth Amendment to the Constitution of the United States.

The consideration of the Lumber Company's claim of the constitutional right not to be compelled to incriminate itself will be facilitated if certain essential and perti-

nent facts be firmly kept in view. The Lumber Company is a private business corporation created by and existing under the laws of the State of New York (fols. 4, 16). It is charged with an offense which has no relation to any federal privilege or franchise whatsoever—neither the right to engage in interestate commerce, nor the right to use the mails, nor the right to import goods into the country, nor any other right within the grant or control of the National Government. The crime for which it is indicted is that it conspired to cheat a customer, who happened to be a railroad under federal control, by delivering a smaller amount of merchandise than it pretended to have delivered. The merchandise was ordered, delivered and deliverable within the State of New York (fols. 4-5, 17-19). So far as the record discloses, the Lumber Company did not have, and was not exercising, any federal privilege or franchise, and it was not in court to answer for any crime involving its use or abuse of any such privilege or franchise. The question in the case at bar is, therefore, whether, under such circumstances, the Federal Government has, or can have, any such power of visitation over a private state corporation as justifies the denial of the privilege against self-incrimination.

There can be no reasonable denial of the proposition that at common law a corporation has and always enjoyed an immunity against self-incrimination. *Rex* v. *Cornelius*, 2 Strange 1210; *Rex* v. *Worsenham*, 1 Ld. Raymond 705; *Regina* v. *Mead*, 2 Ld. Raymond 927; *The King* v. *Purnell*, 1 W. Bl. 37, 45; *The King* v. *Heydon*, 1 W. Bl. 351; *Regina* v. *Granatelli*, 7 State Tr. n. s. 979, 986, 1062; *Goff* v. *Star Printing Co.*, 21 Abb. N. C. 211; *Matter of*

Attorney-General, 21 Misc. 101, 112, affirmed, 22 App. Div. 285; *Batterman* v. *Journal Co.*, 28 Misc. 375, 376; *Davies* v. *Lincoln Nat. Bank*, 4 N. Y. Supp. 373; *Logan* v. *Pennsylvania R. Co.*, 132 Pa. St. 403, 408; 4 Wigmore on Evidence, p. 3116; 5 *id.* p. 545. The general rule upon the subject is stated by Prof. Wigmore as follows:

> "It is also plain . . . that a *corporation*, when discovery is sought from it as such, is to be equally protected from disclosure, so far as it is capable of committing a criminal act . . .
>
> "The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration."

And in the *Logan* case, *supra*, the court expressly ruled the point, saying:

> "We have carefully considered the position taken by the plaintiffs' counsel at the reargument, that we may require the defendant corporation to produce the required writings, even though a natural person in a like case could not be called upon for their production. We are not able to agree with the reasoning. We think the rules of evidence and the rules of law for the production of writings, are essentially the same whether the defendant is a natural or an artificial person."

It must, therefore, have been in the light of this settled rule of the common law, and with the plain intent to embody it in the Constitution, that the founders of our Government used the following language in the Fifth Amendment:

> "No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any *person* be subject for the same of-

> fence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Generalizing from some declarations of the court in the case of *Hale* v. *Henkel*, 201 U. S. 43, it is sometimes asserted, as a sort of legal formula, that in the federal jurisprudence a corporation is never entitled to the constitutional protection against self-incrimination. Indeed, the Government's brief on the motion to dismiss or affirm in the case at bar repeated the formula, saying (p. 7)—

> "That the books of the corporation might have tended to incriminate it was no reason why they should not be produced, as a corporation is not entitled to the constitutional protection against self-incrimination."

But as said by Mr. Justice Holmes in *Hyde* v. *United States*, 225 U. S. 347, 391:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

In this instance, not only does error lurk in the generalization in question, but it is in fact without any warrant in the decisions of this court. The *Hale* case did not declare any such doctrine. Referring to a transaction having to do solely with interstate commerce and the activities of a state corporation in that particular field, the court asserted that there was in respect to this a visitatorial power in the Federal Government which excluded the corporation's right to claim the privilege against self-incrimination (201 U. S. at p. 75). Nothing

more was claimed; and the general visitatorial power over state corporations, which it would be necessary for the Federal Government to possess in order to destroy the privilege of state corporations in all cases, was expressly disclaimed. Mr. Justice Brown said: "It is not intended to intimate . . . that [the Federal Government] has a *general* visitatorial power over state corporations" (*id.*). All he asserted was that, although the corporation there in question drew its powers and right to exist from the State of New Jersey, its "franchises, *so far as they involve questions of interstate commerce*, must also be exercised in subordination to the power of Congress to regulate such commerce, and [that] *in respect to this* the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner," and towards that end may require the corporation to incriminate itself (*id.*). Mr. Justice Day in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 215, viewed the *Hale* case as do the plaintiffs-in-error herein, for he said concerning it, that—

> "In *Hale* v. *Henkel*, 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared *as to interstate commerce* that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by Congress."

In the *Hale* case, the McAndrews & Forbes Company was charged with violating the Sherman Anti-Trust Law. Perhaps that enactment may be regarded as imposing a condition upon the exercise of the franchise of corpora-

tions to engage in interstate commerce, and thus as endowing the Federal Government, not with "a general visitatorial power over state corporations," but with the right to exercise limited visitatorial power for the purpose of discovering whether a state corporation engaged in interstate commerce has attempted to erect a monopoly therein in violation of the Sherman Law. In the case at bar, however, the Lumber Company is *not* charged with any crime that relates to any federal right or franchise whatsoever—neither the right to engage in interstate commerce as in the *Hale* case and *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, nor the right to use the mails as in the *Wilson* case, 221 U. S. 361, 367, and *Wheeler* v. *United States*, 226 U. S. 478. The attempt under such circumstances to compel the Lumber Company to incriminate itself has, therefore, no warrant in, or relation to, any federal franchise exercised by it, or the abuse of any such franchise. It is purely an attempt on the part of the federal authorities to exercise "a general visitatorial power over state corporations," which the court in *Hale* v. *Henkel* in terms declined to countenance. *Interstate Commerce Commission* v. *Harriman*, 157 Fed. 432, 440; 211 U. S. 407.

It is clearly a *non sequitur* to urge, as did the Government in its additional brief on the motion to dismiss or affirm (pp. 9-10), that states frequently exert large powers of visitation over foreign corporations and that, therefore, the Federal Government ought to have the same powers over state corporations. A foreign corporation has no right within another state, and, consequently, the state may require it to yield up its privilege

to resist self-incrimination as a condition of granting it leave to do business within that state. But a corporation acting within its own state is the recipient of no franchise or privilege or immunity from the Federal Government, and hence is not subject to visitation and inquisition by it.

The attempt on the part of the federal authorities to exercise a power of visitation over a New York corporation, and to do so through the medium of a criminal proceeding in which it is charged with no abuse of any federal franchise conferred upon it, or even with an *ultra vires* act, is particularly groundless when it is recalled that there is no such power of visitation in the State of New York which created the corporation. In *Matter of Norton*, 97 Misc. 289, 300, Mr. Justice Crane, now serving as an associate judge of the Court of Appeals of New York, declared that "in this state there is no general power of visitation in the Supreme Court." An examination of the statutes of New York will disclose that the legislature of that state has taken into its own charge the whole of the visitatorial power of the state and has comprehensively legislated upon and regulated the entire subject, delegating to the courts and to administrative officers, respectively, such particular portions of this power as it deemed fit and proper. The statutory enactments upon this subject are too long to be set forth in full here,* but they may be briefly summarized. Section 16 of the Membership Corporations Law provides for the visitation of membership corporations by a justice of the Supreme Court or a person appointed by the court for that purpose; section 10 of the State

* They are printed in the appendix hereto.

Charities Law provides for a pure visitation by the State Board of Charities of all charitable, eleemosynary, reformatory, or correctional institutions; section 101 of the General Corporation Law provides for an action to be brought by the Attorney-General on behalf of the people for the dissolution of a corporation and the forfeiture of its corporate rights, privileges and franchises where it has remained insolvent for a prescribed period, or has neglected or refused to pay its notes or other obligations for a year, or has suspended its lawful business for a like period, or has in certain instances violated its corporate powers; section 130 of the same law provides that the Attorney-General, when directed by the legislature, must bring an action for the dissolution of a corporation which has procured itself to be incorporated by fraud or concealment; section 131 provides that the Attorney-General, with leave of court, may sue to annul the charter of a corporation which has offended against any provision of the act under which it was created or any law subjecting it to the forfeiture of its charter for abuse of its powers, or has failed to exercise its powers, or done or omitted any act amounting to a surrender of its corporate rights, privileges or franchises, or exercised a privilege or franchise not conferred by law; section 90 provides for proceedings in certain cases by the Attorney-General against the trustees, directors or officers of a corporation, and section 92 provides that the judicial supervision over corporations dealt with in article 5 of the General Corporation Law shall "not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or public officer."

The legislature of the state from which the Lumber Company derives its being has thus plainly evidenced its purpose to retain in itself the visitatorial power over its own corporations, except in the clearly specified instances in which it has delegated definite portions of the power to others. In the instances in which the legislature of New York has conferred upon the courts any authority to visit corporations, it has uniformly prescribed the procedure therefor to be by civil action, as was indeed the settled practice at common law,* and not by indictment as is attempted in the case at bar. The Court of Appeals has made it plain that the power of visitation can be properly exercised in the State of New York only in proceedings to investigate alleged violations of a corporate charter or alleged causes for forfeiting it. *People ex rel. Johnson* v. *N. Y. Produce Exchange*, 149 N. Y. 401, 409; *Matter of Barnes*, 204 N. Y. 108, 116. (See also *United States* v. *Union Pacific R.R. Co.*, 98 U. S. 569, 570, 617, which involved a federal corporation.) In the *Matter of Barnes, supra*, Judge Gray said:

> "Unquestionably, as a creature of the state, the corporation received its franchises and privileges subject to the laws of the state and the limitations of its charter. In a proper proceeding instituted by the People, through their law officer, against the corporation, or its officers, it might be perfectly proper to investigate its doings and its exercise of powers, and, to that end, to go through its books and papers. *It must submit them, if the proceeding be one to investigate alleged violations of its charter and to in-*

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* Kent's Commentaries, pp. 304–5; 2 Kyd on Corporations, pp. 174, 438; 1 Blackstone's Commentaries, p. 480 *et seq.*; *State ex rel. Cuppel* v. *Milwaukee Chamber of Commerce*, 47 Wis. 670, 679; *Ames* v. *Kansas*, 111 U. S. 449; *Robertson* v. *Bullions*, 9 Barb. 64, 90.

> *quire into causes of forfeiture for abuses of its powers, or privileges, and it cannot refuse upon the ground of self-crimination, as may the individual.* What the citizen may refuse to do is referable to his constitutional rights; but a corporation does not stand on the same ground. It receives its charter, subject to the reserved right of the legislature to inquire into the exercise of the franchises and privileges conferred."

This is but in accordance with the inherent nature of visitatorial power. "The visitatorial supervision inherent in the courts (when not regulated by statute) over the affairs of public or private corporations, extends to the investigation of their proceedings for the purpose of keeping them within their chartered powers and protecting the rights of members against usurpation of the governing body to their prejudice" (*People ex rel. Johnson* v. *N. Y. Produce Exchange, supra*).* In other words, it is primarily and fundamentally a power to compel the corporation to abide by and live up to its charter contract. It is, therefore, properly enforceable by mandamus or, in special cases, by injunction, and by proceedings in the nature of *quo warranto* where the charter contract has been so far violated as to call for its forfeiture or rescission. All these, however, are civil proceedings; and a laborious search of the common law authorities has failed to disclose any case where the visitatorial power was exercised by the courts otherwise than in and by civil proceedings. The reason is obvious. Visitation is exercised only to perfect the obligation of the

*See also Angell & Ames on Corporations (11th ed.), p. 723; 1 Thompson on Corporations (2nd ed.), sec. 476; 2 Purdy's Beach on Private Corporations, sec. 922–3; Spelling on Injunctions, sec. 1804; *Guthrie* v. *Harkness*, 199 U. S. 148, 158–9.

contract between the state and the incorporators; while criminal proceedings have for their purpose, not the enforcement of any charter contract, but the punishment of an offender against the penal laws. (See *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 288, where this distinction is emphasized.) Judge Thompson has expressed the distinction as follows in his work on corporations (2nd ed., vol. I, sec. 475):

> "Police power is exercised, largely, in the way of punishment for default of duty; visitorial power is exercised to prevent default in duty."

Accordingly, in the State of New York the right of private corporations to resist self-incrimination in non-visitatorial proceedings has been respected and enforced without question. *Goff* v. *Star Printing Co.*, 21 Abb. N. C. 211; *Batterman* v. *Journal Co.*, 28 Misc., 375, 376; *Davies* v. *Lincoln Nat. Bank*, 4 Supp. 373; *Matter of Attorney General*, 21 Misc. 101, 112, affirmed, 22 App. Div. 285.

It is submitted that it is unreasonable to deny this privilege to a corporation in a case in which no visitatorial power is in fact being exerted against it. Can a corporation be compelled to disclose incriminating matter when made a witness in a private litigation between third parties? In such a case there can, of course, be no pretense even of the existence of any visitatorial power; indeed, the state may not be at all interested in the litigation. Similar considerations require that a corporation shall have its privilege against self-incrimination left unimpaired where the object of the state in proceeding against it is, not the vindication of any charter obliga-

tion, but the punishment of crime. Indeed, it may frequently happen that the corporation, although guilty of an offense, has, nevertheless, committed no *ultra vires* act and has not violated its charter. There are innumerable crimes and *mala prohibita* which a corporation may commit without doing any *ultra vires* act. For example, it may cheat a customer by fraudulently giving him short weight or measure, or conspire so to do, as it is charged the Lumber Company did in the case at bar; it may libel a former employé; it may mistreat its animals or cattle; it may illegally employ child labor, etc., and, nevertheless, always act wholly within its charter powers. The right of visitation over private corporations gives only the right to investigate whether the charter powers of the corporation have been violated or, as Mr. Justice Brown expressed it (*Hale* v. *Henkel*, 201 U. S. 43, 75), the right to "find out whether it [the corporation] has exceeded its powers." In the case at bar, however, none of the Lumber Company's charter powers has been exceeded, and there should, therefore, be no right in any authority, state or federal, to assert visitatorial power over it.

It has been suggested by Professor Wigmore (5 Wigmore on Evidence, p. 545) that "*Hale* v. *Henkel, supra*, may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one," and thus no bar to unrestrained inquisition. But even that theory would not advance the Government in the present case, for here no *ultra vires* act is charged against the Lumber Company, and certainly no abuse of any federal

right or franchise. See *In Re Pacific Ry. Commission*, 32 Fed. 241, 259.

It is, in addition, most respectfully submitted that the *dictum* in *Hale* v. *Henkel* is the result of a failure to discriminate between legislative and judicial power. It may be true, as Mr. Justice Brown stated (201 U. S. at p. 75) that "there is a reserved right *in the legislature* to investigate . . . and find out whether it [the corporation] has exceeded its powers"; but it does not follow at all that the legislature has in fact exercised that power or conferred it upon the courts, where it has enacted no legislation towards that end. If Congress had passed a law declaring that no corporation should engage in interstate commerce or use the mails without subjecting itself to visitatorial jurisdiction or waiving its privilege against self-incrimination, the courts might thereafter, perhaps, be justified in exerting unrestricted visitatorial powers against such corporations. No such power, however, has been exercised by Congress or granted to the courts, and it ought not to be implied and invoked by the judiciary, where Congress has not in any statute seen fit to impose any such conditions upon the right to engage in interstate commerce or the right to use the mails. Certainly no such power can be asserted in the case at bar where the alleged offense of the Lumber Company has no connection with any federal privilege whatever or with interstate commerce.

There is no warrant for holding that a corporation is not a "person" within the meaning of the term as employed in the Fifth Amendment. Certainly a corporation may not be charged with an infamous crime except

upon a presentment or indictment by a grand jury (*United States* v. *J. Lindsay Wells Co.*, 186 Fed. 248); few would seriously dispute its right to be free from repeated prosecutions and punishment for the same offense; and it is too well established to be now controverted that a corporation is as much a "person" whose liberty and property are constitutionally guaranteed under the Fifth and Fourteenth Amendments against deprivation without due process of law, as any natural person (*Santa Clara County* v. *Southern Pac. R.R. Co.*, 118 U. S. 394, 396; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *County of San Mateo* v. *Southern Pac. R.R. Co.*, 13 Fed. 145, 151). There is then no justification to be found in the words of the Fifth Amendment for denying that a corporation is likewise a "person" within the meaning of the clause against self-incrimination, particularly when it is recalled that the common law included corporations among those entitled to this particular privilege and immunity, and especially when it is recalled that "at the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world" (*Paul* v. *Virginia*, 8 Wall. 168, 182-3).* Manifestly, if the framers of the Constitution had intended a distinction

* Mention was made of corporations in the constitutional convention in connection with proposals for granting charters (Madison's Journal, pp. 549, 725).

between natural persons and corporations and any alteration in the nature of the common law immunity which they were embodying and perpetuating in the Constitution, they would have plainly declared it, especially in a matter of such great moment (*In re Pacific Ry. Com'n*, 32 Fed. 241, 250). It is trite learning that a corporation is deemed a "person," a "citizen" and one of the "people" in the sense in which those terms are elsewhere employed in the Constitution (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154; *Louisville Railroad Co.* v. *Letson*, 2 How. 497, 552; *Hale* v. *Henkel*, 201 U. S. 43, 76), as well as within the meaning of innumerable statutes containing these and similar expressions; and it is, therefore, quite impossible to frame a logical theory, consistent with these precedents, that will exclude corporations from the connotation of the word "person" in the Fifth Amendment.

The fact that the privilege against self-incrimination is personal and that a corporation cannot itself appear and give oral testimony and thus claim the privilege while in the witness chair, offers no tenable ground of distinction. It merely means that a corporation cannot claim the privilege in relation to oral testimony which it can never give. But plainly a corporation *can* be a witness against itself through its own records, books and papers as effectually as any natural individual or co-partnership, and it is certainly called upon to testify against itself when it is itself required, as in the case at bar, to produce its own private books and papers in a criminal proceeding directed against it. There is, therefore, nothing inherently unreasonable in claiming for a corporation the right to be protected against self-incrimination to

the extent to which its own records can furnish evidence against it for the purpose of subjecting it to punishment by way of fines and penalties "in a criminal case."

It is, to repeat, beyond controversy that a corporation is numbered among the "people" who, under the Fourth Amendment, are entitled "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," and "the intimate relation" between, and correlative character of, the Fourth and Fifth Amendments were pointed out by this court in *Boyd* v. *United States*, 116 U. S. 616, 633. Unreasonable searches and seizures are almost never made for any other purpose than to discover incriminating evidence. It was recognized at common law that an accused was not privileged from self-incrimination by his books and papers when they were produced by a third party (*Francia's Trial*, 15 How. St. Tr. 897, 966—Pratt, J.), and it was in order to have the benefit of this rule and thus to evade the privilege, that unlawful searches and seizures of documentary proof were resorted to in the eighteenth century. But the famous decision of Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1063-74, put an end to this practice and made unlawful searches for incriminating evidence. He said (at p. 1074):

> "Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence . . . . It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent, would be confounded with the guilty."

Concerning this decision Mr. Justice Bradley said in *Boyd* v. *United States*, 116 U. S. 616, 630, 633:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court . . . . Any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.
>
> "Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? . . . .
>
> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

If this be still true—and it cannot be doubted that it is, since the *Boyd* case has been cited with approval more than forty times by this court—it is difficult to perceive

why a corporation, which is one of the "people" to be protected against unreasonable searches and seizures under the Fourth Amendment, should not be regarded as a "person" entitled to be protected against being compelled to incriminate itself, under the correlative and complementary Fifth Amendment. It should be borne in mind that this question was not decided in *Hale* v. *Henkel*, 201 U. S. 43, the court saying (at p. 70) that "the question whether a corporation is a 'person' within the meaning of this Amendment really does not arise."

But even if a corporation were not a "person" within the meaning of this particular clause of the Fifth Amendment, it would not follow that it would have no privilege or immunity against self-incrimination. Prof. Wigmore has pointed out (5 Wigmore on Evidence, p. 545) that "the privilege began, continued, *and now exists at common law, independently of statute;* the Constitution merely guarantees it against legislative alteration." As we have already noted, corporations enjoy this right at common law as a rule of evidence and procedure, and there is no statute, state or federal, which has in any wise abridged or abolished their right in this respect. The Lumber Company in the case at bar was, therefore, entitled to claim its *common law* privilege against self-incrimination as an established rule of evidence and procedure, quite irrespective of the recognition and perpetuation of this express right in and by the Constitution; and the effort of the District Court to deprive it of that right, to its jeopardy and prejudice, denied it the due process of law which another clause of the Fifth Amendment assures to all, including corporations.

The foregoing matters have not been decided adversely to the plaintiffs-in-error in this court. Indeed, the court has not yet had presented to it any case which required it to rule the points hereinbefore considered, and none in which, as in the case at bar, the corporation, charged with a crime having no relation to any federal franchise or privilege, itself invoked the protection of the constitutional guaranty against self-incrimination. To a considerable extent this fact has been recognized and commented upon by lower federal courts. *United States* v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301, 304, and *Cassatt* v. *Mitchell Coal & Coke Co.*, 150 Fed. 32, 45. In the first case cited District Judge Thompson in July, 1915, subsequent to the decisions in *Hale* v. *Henkel* (1906) and *Wilson* v. *United States* (1911), among other things, said:

> "The question of the right of the government to compel the railroad company, to incriminate itself by producing its records, documents, and papers has not been decided by the Supreme Court in any case in which the corporation whose papers were sought to be produced was the defendant charged in the indictment."

And in the latter case cited Judge Lanning, speaking for the Circuit Court of Appeals for the Third Circuit, in January, 1907, after referring to the opinions in *Hale* v. *Henkel*, declared that—

> "These varying expressions of opinion emphasize the impropriety of any expression of opinion by us [on this point] before counsel shall have given us the aid of full arguments thereon."

A brief consideration of the decisions themselves will readily show that the exact point now presented has not

heretofore been actually before this court for decision. In *Hale* v. *Henkel*, 201 U. S. 43, and its companion cases (*McAlister* v. *Henkel*, *id.* 90, and *Nelson* v. *United States*, *id.* 92), the question before the grand jury was whether the corporation had violated the Sherman Anti-Trust Law, and, therefore, related to the conduct of the corporation while engaged in interstate commerce. The McAndrews & Forbes Company, the corporation whose books were sought to be compulsorily produced, was, moreover, not served with any subpœna; it was not directed to produce any book or paper, and it took no action to assert its own constitutional rights in the matter or to resist the production of its private records. Its secretary, Hale, was alone served with a subpœna which required him to produce the papers in question, and he refused to do so, because, as he alleged, the documents might incriminate *him* (201 U. S. at p. 46). The question of incriminating the corporation was not in fact raised and was not before the court. It was held that Hale could not plead his own privilege because a statute granted him immunity, and it was added that he as agent could not rely upon any constitutional privilege which his corporation might assert under the Fifth Amendment, because the privilege against incrimination was personal to the witness and not derivative from his principal. The court said (201 U. S. at p. 70):

> "The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by *oral* evidence in the person of some one of its agents or employés."

It is, of course, manifest that a corporation cannot directly give oral testimony, and, consequently, cannot claim any privilege in respect thereof. Orally it must always speak through natural agents. But what its right would be when it was itself called upon by subpœna *duces tecum* to produce incriminating documentary evidence in a proceeding directed against itself, and when it thereupon duly and promptly claimed its privilege in its own behalf, was not presented or decided in *Hale* v. *Henkel* and not at all involved in the facts then before the court.

In *Wilson* v. *United States,* 221 U. S. 361, the grand jury was investigating alleged fraudulent use of the mails. The corporation was, furthermore, not charged with any offense, but its president, Wilson, was so charged. A subpœna *duces tecum* directed to the corporation was served upon him requiring the corporation to produce certain writings. The president declined to produce the papers called for upon the ground that they would tend to incriminate *him* (221 U. S. at pp. 363, 369, 377). The board of directors of the corporation appeared before the court, declared their willingness and that of the corporation itself to comply with the writ, and presented to the court their formal action taken at a meeting of the board by which they on behalf of the corporation had demanded of the president that he deliver up to them the corporate books so that they could obey the subpœna. The following extracts from the decision (221 U. S. at pp. 371, 376) clearly disclose these facts:

> "On behalf of the directors before the court it was stated that they had made efforts to obtain the books for production before the grand jury, but that Wilson had declined to surrender them. They pre-

sented the minutes of a meeting of the board of directors held on that day at which these directors, constituting a majority of the board, had passed a resolution demanding of Wilson the possession of the letter press copy books called for by the subpœna 'for the production of the same before the Federal Grand Jury' . . . .

"The corporation made no objection of any sort. The appellant did not attempt to assert any right on its part; his conduct was in antagonism to the corporation, so far as its attitude is shown. A majority of the directors, not including the appellant, appeared before the court and urged their solicitude to comply with the writ. They presented their formal action taken at a meeting of the board, in which they demanded of the appellant the delivery of the books for production before the grand jury."

This corporate action effectually waived whatever privilege the corporation had or might have, and, therefore, the question whether a corporation could be compelled to produce documents and incriminate itself against its will and in spite of its claim of privilege, duly and seasonably made, was not presented in the case and could not, therefore, properly be adjudicated therein. The court in the *Wilson* case merely decided that Wilson could not assert the corporation's privilege when it was subpœnaed and had duly waived its rights.

In *Dreier* v. *United States*, 221 U. S. 394, decided at the same term as the *Wilson* case, "the grand jury was conducting an inquiry with respect to alleged violations of the customs laws" (p. 399). The subpœna was also not even addressed to the corporation. It was addressed to and served upon one of its officers, and the corporation took no steps to claim its privilege and made no objection to the production of the documents.

The case of *Wheeler* v. *United States,* 226 U. S. 478, involved a grand jury investigation concerning the fraudulent use of the mails. It is similar in principle to the above, although the subpœna was there directed to the corporation. The corporation made no objection and claimed no privilege in respect of the books and papers called for. On the contrary, the officers who received the writ asserted that the papers were their private property and tended to incriminate *them.* The court found, to the contrary, that the books and papers were still corporate records, and there being no protest whatever by the company itself, upheld and enforced the subpœna. *Grant* v. *United States,* 227 U. S. 74, is to the same effect as the *Wheeler* case.

Baltimore & Ohio Railroad v. *Interstate Commerce Commission,* 221 U. S. 612, was wholly a civil controversy and not at all an attempt to visit a corporation by indictment. The court upheld the right of the Interstate Commerce Commission to exercise visitatorial power over a corporation engaged in interestate commerce in respect of a matter directly related thereto, namely, the hours of labor of employés engaged in such commerce. The case is, therefore, quite different from that at bar.

In *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, the plates and pictures which infringed the plaintiff's copyright had been seized under a writ of replevin. If this seizure was unlawful, the defendant should have promptly applied to the court for the return of the property and not have waited until the evidence was offered at the trial before objecting. *Weeks* v. *United States,* 232 U. S. 383, 396; *Adams* v. *New York,* 192 U. S.

585, 597. When the evidence was thus produced by a third party, the defendant was not compelled to incriminate itself, was not made a witness, and was not then in any position to assert its privilege against incrimination. *Hale* v. *Henkel*, 201 U. S. 43, 69-70. Again, by virtue of the statutes regulating copyright, the infringing plates and pictures became the property of the plaintiff, and he had, therefore, the right to their possession. This property right the defendant could not defeat by claiming that the property in question tended to incriminate it. Finally, the defendant's acts in infringing the plaintiff's copyright were neither criminal nor fraudulent and the penalty therefor was not at all criminal in its nature. As pointed out in *Boyd* v. *United States*, 116 U. S. 616, 633-4, the privileges of the Fourth and Fifth Amendments apply only to forfeitures founded upon criminal acts.

The question raised in the case at bar did not and could not arise in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 552. That will at once be apparent from the following extract from the opinion of Mr. Justice Peckham:

> "The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for inspection by the court, though before they were to be used in evidence. *If, after that inspection, any portion were found of that character, the court held that such portion would be excluded.* As, however, the company failed and refused absolutely to produce any of the books, with some unimportant exceptions, it was

adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for the contempt. Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such non-production. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses. The statute might as well not exist if this were to be permitted."

Hammond Packing Co. v. *Arkansas*, 212 U. S. 322, was a proceeding by the State of Arkansas, which had theretofore granted the defendant foreign corporation leave to do business within the state, for a judgment revoking the leave (p. 334). It was, therefore, a visitatorial proceeding, somewhat in the nature of *quo warranto*, and quite unlike the case at bar. Moreover, as the state practice in regard to compelling the disclosure of corporate records was the same for both domestic and foreign corporations within the state, it could not properly be asserted that the defendant corporation had been denied the equal protection of the laws; and, as the Fifth Amendment is not applicable to the several states, there could in that case be no claim of want of due process of law in respect of the state enactments requiring disclosures and penalizing their refusal. *Twining* v. *New Jersey*, 211 U. S. 78.

It will be perceived that in the majority of the foregoing cases some federal privilege or franchise was directly concerned and exercised by the corporation, whilst in the case at bar the contrary is true; and that in them, moreover, the corporation itself did not raise the ques-

tion of its own privilege, whilst in the case at bar the Lumber Company has clearly and distinctly done so, and that, consequently, the precise question whether a corporation, under such circumstances, is entitled to immunity against self-incrimination through compulsory production of its books and papers, has not yet been decided by this court. Whatever may have been heretofore said was, therefore, necessarily *obiter dictum*, to which the following observation of Mr. Justice Pitney in *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 538, is peculiarly applicable:

> "As was well said by Mr. Chief Justice Marshall, in one of his great opinions, *Cohens* v. *Virginia*, 6 Wheat. 264, 399: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' And if this be true with respect to mere *dicta*, it is no less true of concessions made for the purpose of narrowing the range of discussion, or of testing, by assumed obstacles, the validity of the reasoning by which the court reaches its conclusions upon the point submitted for decision."

In the additional brief of the Government on the motion to dismiss or affirm the following was stated (p. 9):

> "An effort is made [by the plaintiffs-in-error] to distinguish *Hale* v. *Henkel* on the ground that the United States has greater power over a corporation when investigating alleged violations of statutes based on the interstate commerce power than it has when investigating alleged violations of other statutes. The basis of this attempted distinction is that a corporation engaged in interstate commerce ex-

ercises a Federal franchise and is therefore subject to the visitatorial power of the United States.

"The Constitution of the United States confers no right to engage in interstate commerce. That power is derived by a corporation from its charter. Nor is any franchise granted under the Sherman Act or the Act to Regulate Commerce. These acts confer no rights. They merely regulate and restrain the exercise of corporate power."

This is an attempt at one and the same time to claim the benefit of the so-called rule of the *Hale* case denying certain kinds of state corporations the privilege against incrimination, while repudiating the express and necessary reasoning upon which that rule was founded; it is adopting the argument of the dissenting justices (201 U. S. at p. 86), but rejecting the inevitable conclusion therefrom. Individuals cannot, of course, be compelled to incriminate themselves. How, then, can state corporations be compelled so to do by the Federal Government when they are not created thereby and exercise and enjoy no privilege or franchise thereunder? Such corporations must necessarily stand in the same relation to the Federal Government as similar groups of unincorporated individuals. *In re Pacific Ry. Comm.*, 32 Fed. 241, 259. State corporations are merely instrumentalities through which individuals exercise their rights and powers. *Baltimore & Potomac R.R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 330; *Providence Bank* v. *Billings*, 4 Pet. 514, 562. The constitutional rights of state corporations must, therefore, be referable to their membership; and it certainly cannot reasonably be implied that the individuals composing such membership intended to yield up any constitutional privilege that would put them

at a disadvantage in competing with unincorporated individuals, in favor of a sovereignty to which they owe neither their existence nor any franchise or privilege.

It was held in *Crutcher* v. *Kansas*, 141 U. S. 47, 57, and reaffirmed in *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215, that the right—

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

As the Government declares that there has been no contrary regulation of Congress on the subject and that "the Constitution of the United States confers no right to engage in interstate commerce," it would seem to follow that there was no basis for asserting in the *Hale* case that visitatorial power over state corporations engaged in such commerce resided in the Federal Government. But it is unnecessary for the plaintiffs-in-error to resolve the doubt which the Government has thus cast upon the soundness of the reasoning in *Hale* v. *Henkel*. If it be erroneous, the Lumber Company is clearly entitled to insist upon its privilege against self-incrimination. If, on the other hand, the reasoning be right, the Lumber Company is still entitled to the privilege, because then visitatorial power cannot be exerted over it by the Federal Government in respect of a matter having no relation to any federal privilege or franchise whatever.

III.

As to the defective service of the subpœnas.

The record also shows, as set forth in the foregoing statement (pp. 19-20, 21), that the subpœnas *duces tecum* were not duly served upon the plaintiff-in-error Frederick W. Silverthorne. He could not, therefore, be legally punished for refusing to comply therewith. The objection was duly raised in the court below.

In the recent case of *Sugarman* v. *United States*, 249 U. S. 182, 183, the court said:

> "Thirty of the rulings excepted to below are assigned as errors here. If any one of them involves a constitutional question which is substantial, or was such when the defendant sued out his writ of error, we have jurisdiction to review all the questions raised and it is our duty to determine them, so far as necessary to afford redress, even if we should conclude that the constitutional question was correctly decided below. *Williamson* v. *United States*, 207 U. S. 425, 432, 434; *Goldman* v. *United States*, 245 U. S. 474, 476."

See also *Michigan Cent. R.R.* v. *Vreeland*, 227 U. S. 59, 63, to the same effect.

The court will, consequently, have to consider, in the case at bar, whether the service of the subpœnas upon Mr. Silverthorne was regular and legal.

The federal statutes do not provide how subpœnas *duces tecum* shall be served nor do the rules of court. The matter is thus remitted for regulation to the common law or local state, and both require that the original subpœna shall be exhibited to the witness. *Muscott* v. *Runge*, 27 How. Pr. 85, 96; *Garden* v. *Creswell*, 2 M. & W. 319; *Smith* v. *Truscott*, 6 Man. & G. 267; sec. 852, N. Y. Code

Civ. Proc.; sec. 615, N. Y. Code Crim. Proc.* In the case at bar the original subpœnas were not shown to Mr. Silverthorne, nor did the process server so much as tell him what the papers were. The marshal, without any explanation whatever, merely laid copies of the papers in front of Mr. Silverthorne and departed. His returns certify only that (fols. 238, 241, 243, 247, 250, 253).

The service was, therefore, plainly bad, and it follows that Mr. Silverthorne, who duly and promptly objected thereto on that specific ground (pp. 98-9), could not properly be punished for contempt for failing to comply with the subpœnas. The suggestion in the Government's prior briefs that he waived the point of service, is clearly refuted by the record.

CONCLUSION.

The rights which this writ of error presents to the court for adjudication are of the greatest importance. If the plaintiffs-in-error do not prevail, innumerable innocent persons, individuals as well as corporations, will hereafter enjoy their constitutional right to be protected against unreasonable searches and seizures only at the sufferance of public officials, and official lawlessness will be encouraged. Corporations, which are after all but associations of individuals just as copartnerships are (*Hale* v. *Henkel*, 201 U. S. at p. 76), will then, moreover, be outlawed and subject to have their property appropriated by fines and penalties under circumstances in which the natural persons, who are their competitors and no

*These statutes are printed in full in the appendix.

better, would enjoy absolute immunity because of their constitutional privilege against self-incrimination. It is submitted that this court can give its approval to no such doctrines, and that the judgment of the court below should, therefore, be reversed.

New York, November 17, 1919.

WILLIAM D. GUTHRIE,
HENRY W. KILLEEN,
JAMES O. MOORE,
Of counsel for plaintiffs-in-error.

APPENDIX.

NEW YORK STATUTES.

Membership Corporations Law.

§16. *Visitation of supreme court.* All membership corporations with their books and vouchers, shall be subject to the visitation and inspection of a justice of the supreme court, or of any person appointed by the court for that purpose. If it appears to such court by the verified petition of a member or creditor of any such corporation, that it, or its directors, officers or agents, have misappropriated any of the funds or property of the corporation, or diverted them from the purpose of its incorporation, or that it has acquired property in excess of the amount which it is authorized by law to hold, or engaged in any business other than that stated in its certificate of incorporation, it may order that a notice of at least eight days be served on the directors of the corporation, with a copy of such petition, requiring them to show cause, at a time and place to be therein specified, why they should not be required to make and file an inventory and account of the property, effects and liabilities of such corporation with a detailed statement of its transactions during the twelve months next preceding the granting of such order; and if, on the hearing of such application, no good good cause is shown to the contrary, the court may make an order requiring such inventory, account and statement to be filed, and proceed to take and state an account of the property and liabilities of the corporation, or appoint a referee for that purpose; and when such

account is taken and stated, it may, after hearing all the parties to the application, enter a final order determining the amount of property so held by the corporation, its annual income, whether any of the property or funds of the corporation have been misappropriated or diverted to any other purpose than that for which such corporation was incorporated, and whether such corporation has been engaged in any other business than that specified in its certificate of incorporation, from which final order an appeal may be taken by any party aggrieved to the appellate division of the supreme court, and to the court of appeals; but no corporation shall be required to make and file more than one inventory and account in any one year, nor to make a second account and inventory, while proceedings are pending for the statement of an account under this section.

State Charities Law.

§10. *Visitation, inspection and supervision of institutions.* All institutions of a charitable, eleemosynary, reformatory or correctional character or design, including reformatories (except those now under the supervision and subject to the inspection of the prison commission), but including all reformatories, except those in which adult males convicted of felony shall be confined, asylums and institutions for idiots and epileptics, almshouses, orphan asylums, and all asylums, hospitals and institutions, whether state, county, municipal, incorporated or not incorporated, private or otherwise, except institutions for the custody, care and treatment of the insane, are subject to the visitation, inspection and

supervision of the state board of charities, its members, officers and inspectors. Such institutions may be visited and inspected by such board, or any member, officer or inspector duly appointed by it for that purpose, at any and all times. Such board or any member thereof may take proofs and hear testimony relating to any matter before it, or before such member, upon any such visit or inspection. Any member or officer of such board, or inspector duly appointed by it, shall have full access to the grounds, buildings, books and papers relating to any such institution, and may require from the officers and persons in charge thereof any information he may deem necessary in the discharge of his duties. The board may prepare regulations according to which, and provide blanks and forms upon which, such information shall be furnished, in a clear, uniform and prompt manner, for the use of the board. No such officer or inspector shall divulge or communicate to any person without the knowledge and consent of said board any facts or information obtained pursuant to the provisions of this chapter; on proof of such divulgement or communication such officer or inspector may at once be removed from office. The annual reports of each year shall give the results of such inquiries, with the opinion and conclusions of the board relating to the same. Any officer, superintendent or employee of any such institution, society or association who shall unlawfully refuse to admit any member, officer or inspector of the board, for the purpose of visitation and inspection, or who shall refuse or neglect to furnish the information required by the board or any of its members, officers or inspectors, shall be guilty of a

misdemeanor, and subject to a fine of one hundred dollars for each such refusal or neglect. The rights and powers hereby conferred may be enforced by an order of the supreme court after notice and hearing, or by indictment by the grand jury of the county, or both.

General Corporation Law.

§90. *Action against officers of corporation for misconduct.* An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply.

§92. *Visitatorial power over corporation not affected by this article.* This article [*i. e.,* Article 5] does not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or a public officer.

§101. *Action to dissolve a corporation.* In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.

4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.

§130. *Action by attorney-general to annul corporation when legislature directs.* The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

§131. *Action by attorney-general to annul corporation by leave of court.* Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or any act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law.

Code of Civil Procedure.

§852. *Mode of serving subpœna issued out of a court.* A subpœna, issued out of the court, to compel the attendance of a witness, and, where the subpœna so requires, to compel him to bring with him a book or paper, must be served as follows:

1. The original subpœna must be exhibited to the witness.

2. A copy of the subpœna, or a ticket containing its substance, must be delivered to him.

3. The fees, allowed by law, for traveling to, and returning from, the place where he is required to attend, and for one day's attendance, must be paid or tendered to him.

Code of Criminal Procedure.

§615. *How served.* A subpœna is served by delivering it, or by showing it, and delivering a copy thereof, to the witness personally.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

United States Supreme Court.

OCTOBER TERM, 1919.

No. 358.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,
Plaintiffs-in-error,

v.

THE UNITED STATES OF AMERICA,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

WILLIAM D. GUTHRIE,
HENRY W. KILLEEN,
JAMES O. MOORE,
Of counsel for plaintiffs-in-error.

United States Supreme Court.

OCTOBER TERM, 1919.

No. 338.

SILVERTHORNE LUMBER COMPANY, INC., and FREDERICK W. SILVERTHORNE, individually and as president of the Silverthorne Lumber Company, Inc.,
Plaintiffs-in-error,

v.

THE UNITED STATES OF AMERICA,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

I.

The following features appear conclusively in and by the record now before the court, and should be at once summarized and emphasized in reply to the argument of the Government, viz:

(1) That it was found below that "it satisfactorily appears to the court that the books, papers, memoranda, property and effects were unlawfully seized and carried away by officials of the United States, in pursuance of an invalid subpœna *duces tecum*, in violation of the constitutional rights and privileges of the petitioner" (p. 38).

(2) That the papers, books and documents called for by the six subpœnas in question were those thus seized during the unlawful raid on February 25th (pp. 57, 77-78, 90-91).

(3) That the United States attorney and his assistants acquired their knowledge of the books, papers and documents specified in the six subpœnas *duces tecum* in violation of the company's constitutional rights or privileges, by means of unlawful acts of search and seizure (pp. 57-9, 61, 77-78, 89), but are nevertheless now seeking to consummate and profit by their own wrong and secure the benefits and fruits of their unlawful acts (p. 93).

(4) That the six subpœnas *duces tecum* collectively called "for the production of practically all of the books, papers and documents of your petitioner [the Lumber Company], as well as a great number of books, papers and documents belonging to the said Asa K. Silverthorne" (pp. 16, 57, 58, 61-3, 77, 89-90).

(5) That the United States attorney sought the books, papers and documents for the purpose of incriminating the Lumber Company in a criminal proceeding pending before the Grand Jury (pp. 62-3, 78-79, 90-91, 115), and that it was not denied that the said books, papers and documents would tend to incriminate the company (pp. 91-92).

(6) That a number of the papers called for by the subpœnas *duces tecum* (seized during the unlawful raid) had not yet been returned to the Lumber Company (pp. 56, 75-76, 77, 88, 97).

(7) That the point of defective service of the subpœnas was duly and fully presented on the return of the order to show cause for a rule directing the plaintiffs-in-error to comply with the subpœnas *duces tecum* (pp. 85-86, 98-99, 100-102).

II.

It is stated in the brief of the Government (p. 2) that the court found that the books, papers and documents had been unlawfully carried away "pursuant to an invalid search warrant." This is an error, undoubtedly inadvertent. The fact is that the court found that the only document the raiding officials possessed was "an invalid subpœna *duces tecum*" (rec. p. 38). The deputy marshal and his aids knew they were acting only under a subpœna and not a search warrant of any kind, valid or invalid (see p. 27), and they did not have the slightest excuse or color of authority for any search or seizure.

Although the wholly unauthorized and reprehensible character of the search and seizure is now admitted by the Government (brief, p. 47), it, nevertheless, seeks to escape from the consequences by arguing that it was merely the unauthorized behavior of minor officials, for which the Government should not be held responsible. Yet, one of the raiders was a representative "of the Department of Justice" and another "a representative of the American Railroad Administration" (p. 27). It is unnecessary to repeat here the facts detailed in our main brief showing that the raid and seizure were undoubtedly carefully devised and planned beforehand by the United States attorney himself. His own affidavit of March 1st, at p. 25, shows this quite persuasively. (See also pp. 18, 26-27 and 46 as to raid being "under the direction of the United States attorney and United States marshal.") The Government now argues (p. 47):

> "At the outset we desire to join counsel for plaintiffs in error in sincere and severe condemnation of

> the proceedings of the Federal officials in the execution of the first subpœnas. The Department of Justice never has approved of or condoned such lawless action, and it is to be hoped it never will. We can not, however, agree with counsel that such illegal action of subordinate public officials should forever prevent the United States from securing by legal process relevant testimony to a violation of its laws where no right under the fifth amendment can be successfully set up."

But this latter argument is in direct contradiction of the plain principle and *ratio decidendi* of the *Weeks* case, 232 U. S. 383, and of the *Flagg* case, 233 Fed. 481 (C. C. A.). If, as the Government argues (brief, p. 15, *et seq.*), the original wrongful search and seizure are immaterial, then the *Weeks* case would have been differently decided, provided merely that the Government had gone through the formality of first returning the seized papers to Weeks after copying and photographing them and had thereafter proved his possession of them and given copies in evidence. The language of the opinion certainly does not warrant any such inference. In the *Flagg* case the Government actually followed that plan and made a formal return of the papers but was allowed by the trial court to use the information obtained from them to convict, and the Circuit Court of Appeals held this to be error calling for reversal.

Notwithstanding its condemnation and repudiation of the wrongful acts "by officials of the United States" (p. 38), the Government in the statement prefacing its brief (p. 2) describes and characterizes, by the rather mild euphemism "selected", the high-handed and lawless acts of the United States marshal and his aids in

unlawfully searching the premises of the Lumber Company and seizing *all* its books, documents and papers, forcibly removing them to the private office of the United States attorney (rec. pp. 23, 29) and compelling all the office employees to accompany them (p. 23).

In view of the argument in the brief of the Government, it should be recalled at the outset that the constitutional guaranties to the people of the United States embodied in the Fourth Amendment are unqualifiedly directed against (1) all manner of unreasonable searches and seizures and (2) the issuing of search warrants at all except "*upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*" These privileges and immunities are not limited to incriminating evidence but embrace and protect the people as to all and singular "their persons, houses, papers, and effects." Hence, it must be manifest that it is wholly immaterial whether the papers and effects unlawfully seized are or are not incriminating: whether they are or are not, they are alike protected by the Constitution against unlawful seizure and unlawful use based on such a seizure. And this is as true in relation to corporations as it is to individuals (*Hale* v. *Henkel*, 201 U. S. at p. 76).

III.

It surely argues nothing to say that the *Weeks* case concerned an individual while the case at bar affects a corporation. The Fifth Amendment was not involved in the *Weeks* case. The defendant was not compelled to

testify or produce papers there. His papers were produced by third parties, and they only testified. The Fifth Amendment was, therefore, inapplicable. *Adams* v. *New York*, 192 U. S. 585, 597-8. The sole question in the *Weeks* case, as in the case at bar, was whether the Government should be allowed to profit by lawless official action. It was insisted by the Government there, as here (Govt's brief, p. 4[illegible] *et seq.*), that the consequences of the unconstitutional conduct of the officers should not be visited upon the Government; but the court realized that to sustain such a contention would mean the nullification, for all practical purposes, of the protection and guaranty which the Fourth Amendment were intended effectually to secure.

Indeed, the argument of the Government, as now presented, if sound, would necessarily result in the conclusion that corporations in this country are no longer to be protected against unreasonable searches and seizures and unlawful raids under the Fourth Amendment, because corporations cannot in certain cases avail of the additional and distinct constitutional guaranty in the Fifth Amendment against compulsory self-incrimination. This reasoning would in effect to all intents and purposes place private corporations beyond the protection of the Constitution. It has yet to be held that because corporations may not refuse to incriminate themselves, they are thereby excepted from the protection of the Fourth Amendment. It should be borne in mind that the right against lawless seizures guaranteed by the Fourth Amendment is intended to be a protection for all papers and documents, whether in-

criminating or not, and that a corporation is as much entitled to the benefit of this portion of the Constitution as an individual. Under the Government's contention, however, a corporation may not claim effective and real protection under the Fourth Amendment unless, somehow, the Fifth Amendment is also available to it.

It should be added that the Government will always have ample power and adequate remedy to enforce its rights and laws without resorting to raids, by applying to the courts for search warrants upon showing probable cause, as commanded by the Fourth Amendment. No sound reason or policy has been suggested why this orderly course of procedure should not be followed in the case of corporations as it must be followed in the case of individuals, nor why the constitutional rights guaranteed by the Fourth Amendment should invariably depend upon the right to avail of the Fifth Amendment. The two amendments have been treated by this court "as quite distinct, having different histories, and performing separate functions" (*Hale* v. *Henkel*, 201 U. S. at p. 72).

The references in the Government's brief (pp. 51, 53) to *Schenck* v. *United States*, 249 U. S. 47, 50, and *Linn* v. *United States*, 251 Fed. 476, 479, are, it seems to us, pointless. In those cases a third party had been subjected to a search and seizure of papers, and evidence incriminating the defendant had thus been discovered. The defendant attempted to resist the admission of this proof because of the wrong done, not to him, but to another; and it was, of course, held that the evidence was properly admissible against him. That is not, however, the case at bar. The Silverthorne Company is objecting

because it itself has been subjected to wrongful and unconstitutional conduct.

IV.

It is submitted that there is no merit in the suggestion that the plaintiffs-in-error should have produced the books, papers and documents in response to the last subpœnas *duces tecum* before claiming the privilege of the Fourth and Fifth Amendments (Govt's brief, pp. 5-6). There was no doubt or want of knowledge as to the nature of the documents in question, and no such point was raised below. The court knew all about the books and papers called for long before the last subpœnas were even served. It had by that time considered and granted a motion to compel their return because unlawfully seized, as well as a motion to set aside a subsequent group of subpœnas *duces tecum* (rec. pp. 38, 88). It had allowed copies to be impounded (rec. p. 39). The court had read in the affidavit of the United States attorney himself, filed in answer to the Silverthorne Company's application for the return of the books, papers and documents (p. 26), that the very same papers as were covered by the subpœnas *duces tecum* were "books, documents and papers actually used by said Grand Jury, offered in evidence and marked for identification for use and consideration by said Grand Jury in its investigation of the alleged violation mentioned in said subpœna *duces tecum,*" and that the United States attorney had insisted upon retaining them because they were "material, relevant and a necessary part of the evidence to be considered by said Grand Jury with reference to the alleged

violation of the statute of the United States." The court also knew that indictments had been found and arrests made, and the petition of the United States attorney for the subpœnas *duces tecum*, moreover, clearly disclosed that the papers he sought were incriminating (pp. 114-5).

It was assumed without question by the court below (see, *e. g.*, pp. 105-6) that these books, papers and documents were incriminating, and no point was made by the learned court or the Government that they should first be produced for inspection by the court on that score. The court, knowing what it did, would probably have treated such an argument as mere trifling, and it is now plainly only an afterthought and a direct change of position to press the contention in this court. No such point was even advanced by the Government when it moved to dismiss or affirm.

V.

It is unnecessary to repeat here the distinctions between the case at bar and the cases cited by the Government in point V of its brief. Nearly all of them are discussed in our main brief (pp. 64-71). *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 611, may, however, be briefly considered. It will be observed that in that case the defendant company urged its rights under the Fourth and Fifth Amendments only at the trial. If it had been subjected to an illegal seizure, that was not the proper procedure to follow in order to raise the question, since it tended to create collateral issues and was, therefore, within the condemnation of the rule laid down in *Adams* v. *New York*, 192 U. S. 585, 597. Like-

wise, the company could not plead the privilege against incrimination, because its acts in infringing the plaintiff's copyright were neither criminal nor fraudulent, and its liability for such infringement was wholly civil and not in any wise criminal in its nature, and, therefore, was not a proper subject upon which to base a claim of privilege. See *Boyd* v. *United States*, 116 U. S. 616, 633-4, where it is pointed out that a penalty action must in effect be a criminal proceeding to justify the assertion of the constitutional privilege. Finally, visitation by the Federal Government in a matter pertaining to copyright concerns a federal right, privilege, or franchise.

So, also, in the *Nelson* case, 201 U. S. 92, the right to erect a monopoly in interstate commerce was involved, and the Federal Government was, therefore, only investigating how the corporation had used the right to engage in interstate commerce. The limited power of visitation by the National Government over the federal rights, privileges and franchises enjoyed by state corporations, which was all that was asserted in the *Hale* case, 201 U. S. 43, 75, affords sufficient basis for the *Nelson* case to rest upon. No case cited by the Government has ever required the court to hold that a private state corporation has no privilege against incrimination as respects the Federal Government, when not charged with the abuse of any federal right, privilege, or franchise and under no investigation in respect thereof.

VI

There is no analogy between the case at bar and such a case as *Kelly* v. *Griffin*, 241 U. S. 6, cited by the Govern-

ment. There the petitioner was a fugitive from Canada. He was, perhaps, illegally arrested by Illinois or Chicago officers, but subsequently he was properly arrested by the federal officers for extradition to Canada. The Federal Government, of course, was not chargeable with the illegality of the conduct of the state officers, and its own officials had done no wrong. In the case at bar, however, the wrong is not that of any state authority, but that of an agency of the Federal Government, and the same agency which would now avail of its own misconduct. The distinction here made was directly ruled in *Weeks* v. *United States*, 232 U. S. 383, 398. It appeared there that Weeks' house was first illegally searched by state police and subsequently was again illegally searched by the United States marshal (p. 306). As has already been pointed out in our main brief, the illegal behavior of the federal marshal and the subsequent use of the papers obtained by him thereby, were the causes of the reversal in this court of the conviction. But the alleged misconduct of the state officers was declared to afford no ground for attacking the judgment. On this point Mr. Justice Day used the following language (p. 398):

> "As to the papers and property seized by the [Kansas City] policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the

Federal Government and its agencies. *Boyd Case*, 116 U. S., *supra*, and see *Twining* v. *New Jersey*, 211 U. S. 78."

Nor was anything inconsistent with the contentions of the plaintiffs-in-error held in *Mahon* v. *Justice*, 127 U. S. 700. It was there distinctly ruled that, under the Federal Constitution and laws, one whose return had been demanded by one state of another state as a fugitive from justice, had no right of asylum or sanctuary in the latter state while the proceedings of extradition were there pending (pp. 714-5). He was, therefore, deprived of no federal right over which the courts of the United States had jurisdiction when he was wrongfully deprived of such asylum and carried into the demanding state, particularly where the demanding state "did not authorize the unlawful abduction of the prisoner from West Virginia," where he had taken refuge (p. 707). All that then occurred was a wrong by private persons to the state of West Virginia and not the United States, and the demanding state was, therefore, able to hold and try the prisoner on the charge existing against him. As no federal right was invaded in these proceedings, however unjust and reprehensible they might be, they involved the violation of no federal right and conferred on the federal courts no jurisdiction, and that was all that was decided in the *Mahon* case or in *Pettibone* v. *United States*, 203 U. S. 192, which followed it. This was an especially proper ruling in cases seeking the writ of *habeas corpus* where no emergency requiring its issuance was alleged and where there were no special circumstances showing that the petitioner would be denied

any right, state or federal, upon his trial. So the court ruled in the *Pettibone* case (see syllabus).

Even less in point for the Government is the case of *Wood* v. *United States*, 16 Pet. 342, which its brief quotes from at p. 16. That case did not involve two seizures, the first wrongful and the second not, as the Government intimates. Goods had in that case been seized, and while held by the Government under the seizure, new grounds to support seizure and forfeiture were discovered. It was declared by the court that these grounds were available to the Government (p. 359). But the case at bar is wholly different. No grounds have ever been adduced, either at the time of the unlawful search and seizure or since, which justify or could justify it. No attempt has ever been made to procure a valid search warrant against the Silverthorne Company, or subsequently to supply the requisite proofs to uphold the original search, even assuming that that course would have been proper. In the case at bar, it is now conceded that the search and seizure were an outrage, and despite the fact that their illegitimate character has never changed, it is, nevertheless, the purpose of the Government to seek full advantage from them. It is submitted that this may not be done without denying rights guaranteed by the Fourth Amendment.

VII.

The statement in the Government's brief (p. 3 and elsewhere) that the claim of defective service "was not made in the petition to quash the subpœnas," must have been inadvertent since the petition itself (p. 77) dis-

closes on its face that it was executed before any officer of the company had been served at all. Of course, the alleged defective service could not be complained of until it had actually been made. The point was, moreover, promptly raised after the service was made (pp. 85-6, 98-9).

The argument at p. 7 that the service upon the corporation was good "taking the attorney and president together," is clearly untenable. Service cannot be made *personally* by serving an individual's attorney or, as in this case, the attorney of his company. Nor is personal service made on a party when only part of the service is made upon him and the rest upon another.

It is further stated by the Government (p. 11) that in using subpœnas *duces tecum* "the atmosphere of a fishing expedition can hardly be avoided, nor does the law require that it should be." We challenge this assertion, and deem it sufficient to point out that such an abuse of legal process has and can have no approval in the courts of the United States.

VIII.

The last part of the brief filed on behalf of the Government suggests, repeating in this respect the view of the court below (rec. p. 106), that it was somehow improper or irregular for the plaintiffs-in-error to insist upon the constitutional rights on the return of the subpœnas *duces tecum* and thereby prevent the grand jury from proceeding with their inquiry, and that they should have obeyed the subpœnas and temporarily yielded up the rights guaranteed by the Fourth and Fifth

Amendments, and have reserved the objections for the trial. The course suggested, however, is not only in conflict with the rule applied in *Adams* v. *New York*, 195 U. S. 585, inasmuch as it necessarily would create the very collateral issues at the trial which it was the purpose of the court in that case to criticize and condemn, but it is also in conflict with the settled law and a fundamental duty in grand jury investigations, since it disregards the rule that grand jurors may not act unconstitutionally any more than trial courts. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Ballman* v. *Fagin*, 200 U. S. 186. Indeed, it is a function and duty of grand juries—perhaps their highest function and duty—not to find or permit any indictment except upon constitutional and legal evidence. *United States* v. *Rubin*, 218 Fed. 245, 248-9, and cases there cited.

It is, of course, no answer at all to urge that the plaintiffs-in-error may, in the end, suffer no injury if they are compelled to reserve their objections until the trial. They ought not to be subjected to the odium of an illegal indictment, nor to the hardship and expense of an unnecessary criminal trial, nor to the unvindicated destruction of constitutional rights, if acquitted, nor to inevitable, though undeserved, disgrace, if convicted. But even if this involved no damage or prejudice whatever, it would yet leave the conclusion unaltered. As declared in *United States* v. *Edgerton*, 80 Fed. 374, 376, which related to the conduct of a grand jury investigation—

> "Where a witness is compelled to testify against himself, the injury inheres in the violence done to

> his rights. It is not susceptible of proof, nor the policy of the law to require it, and the injury done to the public in such case outweighs that suffered by the defendant. It is a matter of the highest public policy that crime shall be punished by legal methods. When these are disregarded, there is the mob, between which, in the pursuit of vengeance, and the officers of the law, acting in its name, but in disregard of it, there is no distinction."

See also the remarks of Peckham, J., in *People* v. *Sharp*, 107 N. Y. 427, 476-7.

It is submitted that the plaintiffs-in-error were not only quite right in acting, but were called upon to assert the constitutional rights, at the earliest opportunity afforded them and by means of an appeal to this court to seek the correction of a judgment that denied those rights; and that, towards that end, they followed the entirely appropriate procedure of appeal heretofore frequently approved by this court. *Alexander* v. *United States*, 201 U. S. 117, 121-2; *Nelson* v. *United States*, *id.* 92, 98; *Wilson* v. *United States*, 221 U. S. 361, and other cases cited in main brief.

CONCLUSION.

It is, therefore, submitted that the contentions made in the main brief filed on behalf of the plaintiffs-in-error should be upheld and that the judgment appealed from should be reversed.

New York, December 9, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SILVERTHORNE LUMBER COMPANY (INC.) and Frederick W. Silverthorne, individually and as President of the Silverthorne Lumber Company, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA, Defendant in Error.

No. 358.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

On February 25, 1919, a *subpœna duces tecum* was issued out of the United States District Court for the Western District of New York to the Silverthorne Lumber Company commanding it to appear forthwith before the grand jury for said district to testify in regard to an alleged violation of the statutes of the United States by John Doe and to bring with it "all documents, books, records, memorandum, papers, etc., relating to movements of cars into and out of your yards; also relating to sale, billing, invoicing,

and charge of said cars and contents thereof," and "all other papers, evidences, or writings concerning these premises which you have in your possession or under your control." (R. 29.) This subpœna was served upon the vice president and treasurer of the company at 10.15 a. m. February 25. (R. 22, 27.) Instead of leaving the subpœna with the vice president for obedience thereto at his discretion, the officials selected the books, etc., for themselves, and took them, with the vice president, to the United States attorney's office. (R. 23.) The vice president was called before the grand jury the next day, but not questioned about the books, etc. (R. 23.) The latter, however, were produced before the grand jury. (R. 25.)

On February 28 the court made an order returnable March 1 to show cause why the books, etc., should not be returned forthwith and the company not have such other relief as was deemed proper. (R. 15, 16.) On March 6 the rule was made absolute, the court holding that the books, etc., had been unlawfully seized and carried away by officials of the United States pursuant to an invalid search warrant in violation of the constitutional rights of the company. It was ordered that all the books, etc., be returned to the company and that the United States attorney and marshal deliver to the clerk of the court all copies, excerpts, notations of and from said books, etc., and all photographs, negatives, and photostats thereof made by them or in the possession of themselves or agents, which copies, etc., the clerk was to place in a

sealed package immune from inspection except on order of the court. (R. 37–39.)

On March 19 six *subpœnas duces tecum* issued out of the District Court (R. 66–73) to the Silverthorne Lumber Co., directing it to appear before the grand jury of said district on March 24 at 10 a. m. and produce certain books, papers, and documents, specified therein with the greatest particularity, in regard to an alleged violation of the statutes of the United States by Asa K. Silverthorne and Frederick W. Silverthorne, stating that for failure to produce them it would be deemed guilty of contempt of court. On March 21 these subpœnas were served upon the attorney for the company by exhibiting to him the originals and leaving copies with him. (R. 77, par. 7, sub. par. 2, 102.) The attorney agreed to have the president of the company at his office the next day so that service might be made on him (R. 102), and in accordance with this prearrangement service was made upon the president at said time and place (R. 102, 103, 99), though it is now claimed that the originals were not exhibited to him as they had been to the attorney. This claim, however, was not made in the petition to quash the subpœnas (R. 73–80), nor until the answer to the rule for contempt (R. 85, 86). On March 22 the company without attempting to comply with their mandates moved to quash the subpœnas for a number of reasons, but mainly because they were illegal and invalid, being violative of the constitutional rights of the company under the fourth and fifth amendments to the Constitution.

(R. 74.) On March 25 this motion was, in effect, denied and the company directed to comply with the subpœnas. (R. 81.) The company refusing to comply (R. 93), a rule was issued (R. 80), and after a full hearing the company and its president were adjudged in contempt and sentenced to fine and imprisonment, respectively. To this judgment they have sued out this direct writ of error from this court on the ground that the Constitution of the United States is involved in the matter.

ASSIGNMENTS OF ERROR.

The assignments of error number 10. (R. 107–110.) On analysis they seem to resolve themselves into the following:

1. The subpœnas were not properly served. (Assignment 10.)

2. They were too broad and sweeping and constituted for this reason alone an unreasonable search and seizure. (Assignments 3 and 5.)

3. They were based on information acquired by the previous illegal seizure and themselves, for that reason alone, constituted an unreasonable seizure, and compulsory self-incrimination. (Assignments 1 and 2.)

4. To produce the papers, etc., specified in the subpœnas, irrespective of the prior illegal proceedings, would compel the company to be a witness against itself in a criminal case contrary to the fifth amendment. (Assignments 4, 6, 7.)

This analysis seems to agree in substance with that given by counsel for plaintiffs in error on pages 23 and 24 of their brief.

ARGUMENT.

I.

EXACT ISSUE RAISED.

(*a*) The exact issue raised on the record in this cause is whether the plaintiffs in error are entitled, for the reasons alleged, to refuse obedience to the subpœnas. They admit that they have made no effort to comply with them, even to the extent of submitting the papers, etc., to the court for a plenary determination of the questions whether the facts showed an unreasonable search, or a possibility of unconstitutional self-incrimination. Instead of this course, the plaintiffs in error moved to quash the subpœnas as being, in and of themselves, on their face, null and void. In *Hale* v. *Henkel*, 201 U. S. 43, 78, Harlan, J., said in his concurring opinion:

> It may be, I am inclined to think as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpœna, upon the ground that it involved an unreasonable search and seizure of the books, papers, and records of the corporation whose conduct, so far as it related to the Sherman Anti-Trust Act, was the subject of examination.

Authorities to the same effect are cited in the note in 15 Fed., p. 723, and it is so held in *United States* v. *Hunter*, 15 Fed. 712, in *Leber* v. *United States*, 170 Fed. 881, 888, and in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 552, 553. The law of England is the same as to discovery of documents. *Spokes* v. *Grosvenor Hotel Co.* (1897), 2 Q. B. 124, 131–134; *National Association* v. *Smithies* (1906), A. C. 434, 437, 438. In the former case the master of the rolls said:

> * * * the objection * * * can not be taken to the summons for discovery of documents but * * * can only be taken in the affidavit in answer.

It would seem, therefore, that the attempt in the case at bar to raise the questions of unreasonable search and self-incrimination was prematurely made. This objection would not apply to the claim that no valid service of the subpœnas was made.

II.

SERVICE OF THE SUBPŒNAS.

(*a*) It is claimed that the originals of the subpœnas were not exhibited to Frederick W. Silverthorne, president of the company, as required by the common law and by the New York statute. The court found that the subpœnas had been duly served. (R. 104.) If the court was mistaken in this, it was mere error, not a denial of due process of law, and can not be corrected by direct writ of error from this court, unless the other alleged constitutional questions are substantial, which we deny.

(*b*) As stated above, it is in effect admitted that the originals of the subpœnas were exhibited to the attorney for the company, who arranged for a meeting at his office when service might be made on the president, and that copies were handed to the president at this meeting arranged for in this manner and for this purpose. This constituted a substantial compliance with the New York statute, since, taking the attorney and president together and in communication, there was an exhibition of the originals to the company.

(*c*) The plaintiffs in error did not complain of the manner of service in their motion to quash (when the defect, if any, could have been easily remedied), nor until their answer to the rule for contempt. In their motion to quash they showed full knowledge of the contents of the subpœnas. The reason for the requirement that the original be exhibited had therefore no force as the matter stood, and the requirement itself was clearly waived.

III.

THE FOURTH AND FIFTH AMENDMENTS MUST BE SEPARATELY CONSIDERED.[1]

(*a*) In the case at bar it is, we submit, most important throughout the consideration of the points made by the plaintiffs in error to keep the question

[1] In what follows it is assumed that this court is of the opinion that the constitutional questions alleged to be involved may be considered on a motion to quash the subpœnas.

whether the subpœnas authorized an unreasonable search and seizure entirely separate and apart from the question whether obedience to them would compel unconstitutional self-incrimination. We believe that it is impossible to reach a correct conclusion on the merits of the claims made by the plaintiffs in error, or to appraise at their true worth the arguments of their counsel, if such complete separation be not constantly maintained.

(*b*) That such a distinction between the fourth and fifth amendments exists and is of importance has been determined by this court. In *Hale* v. *Henkel*, 201 U. S. 43, the court, after disposing of the question whether the immunity granted by the statute was sufficient to satisfy the fifth amendment, took up the question of the fourth amendment, and referring to *Boyd's case* said (201 U. S. 71, 72):

> The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634), "is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the fourth amendment."
>
> Subsequent cases treat the fourth and fifth amendments as quite distinct, having different

histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the constitutionality of the interstate commerce act, so far as it authorized the circuit courts to use their processes in aid of inquiries before the commission, was sustained, the court observing in that connection:

> "It was clearly competent for Congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The court then referred to *Adams' case*, 192 U. S. 585, and to the case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, as illustrations of cases dealing with the fourth amendment prohibiting unreasonable searches and seizures, and concluded (201 U. S. 73, 74):

> We think it quite clear that the search and seizure clause of the fourth amendment was not intended to interfere with the power of of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley*, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this

> question: *Amey* v. *Long*, 9 East 473; *Bull* v. *Loveland*, 10 Pick. 9; *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40; Greenleaf on Evidence, 469a.

In *Wilson* v. *United States*, 221 U. S. 361, the rule thus laid down received a practical application, for the court first considered the question whether the subpœna violated the fourth amendment, saying (221 U. S. 371):

> We may first consider the objections to the validity of the subpœna and then the claim of privilege.

Under the head of "the objections to the validity of the subpœna," the court took up the claim that it was an unreasonable search and seizure, holding that it was not. (221 U. S. 375, 376.) It then took up as a separate matter the claim of self-incrimination and held that it also was without legal foundation. (221 U. S. 377 ad finem.) It therefore seems clear that in spite of the statements of Justice Bradley in *Boyd's case* (statements entitled to the profoundest respect due to the character of the great judge who expressed them) this court has adopted the view of Mr. Wigmore that the fourth and fifth amendments serve entirely different, though equally worthy, ends, and that, unless they are dealt with separately, having in mind their different objectives, nothing but confusion can result in judicial decisions.

IV.

OBJECTIONS OF THE PLAINTIFFS IN ERROR, BASED ON THE FOURTH AMENDMENT, THAT THE SUBPŒNAS AUTHORIZED AN UNREASONABLE SEARCH AND SEIZURE.

(*a*) It is claimed on pages 45, 46 of the brief of counsel for plaintiffs in error that the terms of the subpœnas were so broad as to constitute, for that reason alone, an unreasonable search and seizure. The subpœnas are set out on pages 66 to 73 of the record, and certainly they seem to be as specific and particular in their requirements as is reasonably possible, considering that a *subpœna duces tecum*, like a search warrant, must necessarily be, to some extent, a demand for discovery. The atmosphere of a fishing expedition can hardly be avoided, nor does the law require that it should be. In *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 553, 554, this court said:

> The objection is also made that the documents were not described with the particularity required in the description of documents necessary to a search warrant or subpœna, and that it was not a valid paper and created no obligation to obey the notice, which could form no justification for any proceeding for contempt, and was not due process of law. An examination of the notice to produce shows that the requirements of the notice, while quite broad, yet were limited to such books or papers as related to, or concerned, any deal-

ings or business between January 1, 1904, and the date of the notice, October, 1906, with the parties named therein, who were cattle commissioners of the State of Vermont, and which papers were to be used relative to the matter of complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington. The notice also gave in detail the dates and amounts of checks and vouchers which the company was required to produce. The company refused to produce the books (with the exceptions stated), and even if the notice had been too broad, the objection can not be urged as to the validity of the order adjudging the company guilty of contempt. *Hale* v. *Henkel*, 201 U. S. 43. But unless it can be said that the court or grand jury never has any right to call for all the books and papers or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here is not well founded. We see no reason why all such books, papers, and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so

sweeping in its reach as in the case of *Hale* v. *Henkel, supra.*

In *Wilson* v. *United States,* 221 U. S. 361, the subpœna demanded letter-press copy books of letters and telegrams signed by the president of the company during the months of May and June, 1909 (221 U. S. 367). In regard to this the court said (221 U. S. 376):

> But there is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced. In the present case, the process was definite and reasonable in its requirements, and it was not open to the objection made in *Hale* v. *Henkel, supra* (pp. 76, 77).

In *Wheeler* v. *United States,* 226 U. S. 478, the subpoena required the production of all cash books, etc., covering transactions between October 1, 1909, and January 1, 1911 (226 U. S. 482, 483). The procedure was held valid. (226 U. S. 439.) It is therefore sufficiently established that a subpoena of the character of those set out on pages 66 to 73 of the record is not so broad and vague as to constitute an unreasonable search and seizure.

Counsel apparently seek to avoid the effect of these decisions by the claim that to enforce the subpœnas would be to interrupt entirely the business of the company, a condition according to

counsel not presented to this court in any previous case. But this is merely the effervescence of forensic argument. It might be noted as a curiosity that in *Wheeler and Shaw's case,* 226 U. S. 478, the main point made by counsel, astute according to the lights then before them, was that the corporation had ceased business and therefore an inspection of its books was in effect an inspection of the defendants' private affairs, a claim not taken very seriously by this court. (226 U. S. 489, 490.) It is clear that the question whether the terms of a particular subpœna violate the requirements of the fourth amendment to the Constitution can not be determined by empirical considerations as to whether a particular corporation will be inconvenienced by a writ issued on behalf of the State in order to get evidence that the corporation in question has violated its laws. It would be a queer world in which the Government was restricted in its investigations to dead corporations. The court's attention is invited to the exact language of the subpœnas to which objection is made. They all relate to specific papers touching past transactions and severable in their nature from the going business of the company, except the subpœna set out on pages 68, 69 of the record. This subpœna requires the production of certain journals, ledgers, and check books, covering a period of 14 and 8 months, respectively. This does not seem oppressive but if it was it could easily have been corrected by an application to the trial court.

(*b*) The plaintiffs in error also claim that even if the six subpœnas directly involved in the matter of their contempt were entirely free from any vice, yet they constituted an unreasonable search and seizure because they were based on information derived from the prior illegal seizure.

This claim, however, is contrary to the well-established rule of law that the validity of an arrest or seizure of either persons or property is to be determined by the condition obtaining at the time objection to the arrest or seizure is made. If at that time the arrest or seizure is valid, the fact that a prior arrest or seizure, effective in bringing about the valid action, was entirely or partially illegal is immaterial and tenders a merely collateral issue. This rule is firmly established in the decisions of the Federal courts.

In *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, the court said:

> At common law any person may, at his peril, seize for a forfeiture to the Government; and if the Government adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary to sustain the seizure, or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture.

In *Wood* v. *United States*, 16 Pet. 342, 359, the court said:

> In respect to the point made at the bar as to the validity of the original seizure, or of the causes thereof, we are of opinion that the

> first instruction of the district judge was entirely correct. It is of no consequence whatsoever what were the original grounds of the seizure, whether they were well founded or not, if in point of fact the goods are by law subjected to forfeiture; for the United States are not bound down by the acts of the seizors to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if in point of fact the seizure can now be maintained as founded upon an actual forfeiture thereof at the time of the seizure, and therefore it was rightly held by the judge that no question arose upon the issues which the jury were to try, except upon the causes of forfeiture alleged in the information.

The principle thus laid down as to the seizure of goods for forfeiture is the settled law.

The same principle has been often applied to the seizure of the person.

In *Mahon* v. *Justice*, 127 U. S. 700, a fugitive from the State of Kentucky was unlawfully seized in the State of West Virginia, forcibly abducted to Kentucky, and there arrested for murder. The governor of West Virginia applied for a habeas corpus and an order for his return to West Virginia. The writ was denied. The court said (127 U. S. 708):

> The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it.

After citing certain authorities sustaining this position the court concluded (127 U. S. 712):

> They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another State. It would indeed be a strange conclusion if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated because other parties had done violence to him, and also committed an offense against the laws of another State.

In *Pettibone* v. *Nichols*, 203 U. S. 192, it was claimed that the petitioner had been extradited from Colorado to Idaho and held in the latter State on a charge of murder through a conspiracy between the officers of Colorado and Idaho to railroad him from the former to the latter State without giving him an opportunity to raise the question whether he was a fugitive from justice. The court, after fully stating the authorities, including *Adams* v. *New York*, 192 U. S. 585 (a case of search warrant), said (203 U. S. 216, 217):

> Even were it conceded, for the purposes of this case, that the Governor of Idaho wrongfully issued his requisition, and that the Governor of Colorado erred in honoring it and in issuing his warrant of arrest, the vital fact remains that Pettibone is held by Idaho in actual custody for trial under an indictment charging him with crime against its laws, and he seeks the aid of the circuit court to relieve

> him from custody, so that he may leave that State and thereby defeat the prosecution against him without a trial. In the present case it is not necessary to go behind the indictment and inquire as to how it happened that he came within reach of the process of the Idaho court in which the indictment is pending. And any investigation as to the motives which induced the action taken by the Governors of Idaho and Colorado would, as already suggested, be improper as well as irrelevant to the real question to be now determined. It must be conclusively presumed that those officers proceeded throughout this affair with no evil purpose and with no other motive than to enforce the law.

In *Kelly* v. *Griffin*, 241 U. S. 6, the petitioner had been arrested without a warrant by the Chicago police. Subsequently an extradition warrant was sworn out against him but dismissed. A new warrant was then sworn out upon which he was held at the time of his application. It was claimed that these prior illegal proceedings vitiated the subsequent warrant. The court said (241 U. S. 12, 13):

> But however illegal the arrest by the Chicago police it does not follow that the taking of the appellant's body by the marshal under the warrant of October 2 was void. The action of the officers of the State or city did not affect the jurisdiction of the commissioner of the United States. Furthermore, the order dismissing the complaint of October 2 was that the appellant be discharged forthwith

> from custody; so that on the face of the record it would seem that before being held under the present warrant the appellant had the moment of freedom which he contends was his right. It is urged that the Canadian authorities are trying to take advantage of their own wrong. But the appellant came within reach of the commissioner's warrant by his own choice, and the most that can be said is that the effective exercise of authority was made easier by what had been done. It was not even argued that the appellant was entitled to a chance to escape before either of the warrants could be executed. This proceeding is not a fox hunt. But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form. We are of opinion that in the circumstances of this case as we have stated them the omission of a formal act of release and subsequent arrest, if they were omitted, furnishes no ground for discharging the appellant upon *habeas corpus*. All the intimations and decisions of this court indicate that the detention of the appellant can not be declared void. *Pettibone* v. *Nichols*, 203 U. S. 192; *Iasigi* v. *Van De Carr*, 166 U. S. 391, 393, 394; *Ekiu* v. *United States*, 142 U. S. 651, 662.

It is therefore clear that where liberty of the person is involved a valid detention is not affected by prior illegal arrests even though the present detention is made possible solely through the prior illegal detentions.

This being the rule as to liberty of the person, it follows necessarily that papers and books are not entitled to any greater immunity and the courts have uniformly so held. In *Adams* v. *New York*, 176 N. Y. 351, 358, 192 U. S. 585, 594–598, it was held that the admissibility of certain papers was not affected by the fact that they had been illegally seized. This case is authority mainly on the question of compulsory self-incrimination and will be referred to later under that head. But it clearly decides by inference that the original seizure, even if contrary to the fourth amendment, did not make the provisions of that amendment apply to the subsequent retention of the papers, *provided they were not privileged under the fifth amendment from use as testimony*. In explaining the fourth amendment the court said (192 U. S. 598):

> The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent.

It follows that the Federal courts may, under the authority of section 716, R. S., impound documents which they deem relevant testimony in a criminal case

no matter how they may have come into their possession. In *Perlman Rim Corporation* v. *Firestone Tire & Rubber Co.* Judge Hand impounded certain exhibits offered in testimony before him in a civil cause because he thought they might be relevant on a charge of perjury against a witness. Subsequently their owner attempted to enjoin the United States Attorney from using them before the grand jury. Judge Manton held that the impounding order was valid and that he could order them produced before the grand jury, a *subpoena duces tecum* being unnecessary (244 Fed. 304). His ruling was affirmed by this court (*Perlman* v. *United States*, 247 U. S. 7), the court saying (247 U. S. 15):

> As we have seen, Perlman delivered the exhibits to publicity, made them the means of advantage. They, for the purposes of justice, were taken from his possession and volition into the control and custody of the court. Upon formal motion they were released for the use of the Government, a use as meritorious in consideration as that which determined the ruling in *Ex parte Uppercu*, 239 U. S. 435.

Of course the main point in the case was the right of Perlman under the fifth amendment, and if he could have brought himself within the terms of that amendment the order could not have been made, since it would have been idle to turn the papers over to the grand jury if they could not be used before it. Nevertheless the case shows that, no matter how documents have come under the control of the court, they may be retained without any objection so far

as the fourth amendment is concerned if they are relevant and competent to the issue in a criminal case.

Adopting the principle of these decisions Judge Ray in *United States* v. *Hart*, 214 Fed. 655, denied a motion for the return of papers in the possession of the United States attorney because they had been voluntarily delivered to him by their owner so that their relevancy could not be affected by any claim of immunity from self-incrimination. (And see *Stroud* v. *U. S.*, decided Nov. 24th last.)

The same would be true of papers taken from the possession of their owner by operation of law other than testimonial process. *Kerrch* v. *United States*, 171 Fed. 366, 368, 369. *Johnson* v. *United States*, 228 U. S. 457. Such papers could be reached by the court in a criminal case through impounding order, or subpoena, or warrant without violation of the fourth amendment.

In *United States* v. *Wilson*, 163 Fed. 338, Judge Chatfield refused to return (i. e., impounded) certain chattels taken from the defendant without a writ or warrant, there being no basis for a plea of immunity under the fifth amendment. In *New York Central R. R. Co.* v. *United States* (C. C. A. 1st), 165 Fed. 833, 842, 843, it was held that the court could at the trial order the production of papers in the possession of the attorney for the company, a corporation not being entitled to plead self-incrimination. In *United States* v. *McHie*, 196 Fed. 586, Judge Sanborn made a similar ruling as to the books of a corporation and

made an order impounding them. In *in re Rosenwasser Bros.*, 254 Fed. 171, Judge Chatfield followed his decision in *Wilson's case, supra,* and denied a motion for the return of papers belonging to a corporation.

Certain decisions where a motion to return papers was granted or an impounding order refused can all, with one exception, be explained upon the ground that the papers in question would not have been admissible in evidence as against a claim of immunity under the fifth amendment and hence to bring them into, or retain them in the custody of the court would have been an idle thing, serving no legitimate purpose. Such cases are *United States* v. *Mills,* 185 Fed. 318;[1] *United States* v. *McHie,* 194 Fed. 894; *United States* v. *Mounday,* 208 Fed. 186; *United States* v. *Jones,* 230 Fed. 262; *United States* v. *Abrams,* 230 U. S. 313; *United States* v. *Friedburg,* 233 Fed. 313; *Veeder* v. *United States,* 252 Fed. 414; *In re Marx,* 255 Fed. 344. The one exception is the case of *in re Tri-State Coal & Coke Co.,* 253 Fed. 605, where the court clearly overlooked the rule that a corporation can not plead immunity from self-incrimination and that therefore the books, etc., in question, in so far as relevant, should have been retained by the court, irrespective of the invalidity of the search warrant.

[1] This is an interesting case as an attempt of an able judge to distinguish between burglars' tools, counterfeiting plates, etc., on the one side, and books used in the prosecution of an unlawful business on the other.

The case of *Weeks* v. *United States*, 232 U. S. 383, which can be more conveniently considered under a subsequent heading, is, in so far as the fourth amendment is concerned, a case where the trial court should have refused to retain custody of the papers, not because of anything connected with the original unlawful seizure, but because of the defendant's claim of immunity under the fifth amendment, the papers being the private papers of an individual seized at his residence.

We respectfully submit, therefore, that according to the settled principles of the law the subsequent valid subpœnas issued by the court in the case at bar were not in any way vitiated or weakened in authority or effect by reason of the prior illegal seizure or by reason of anything in connection therewith or arising therefrom. On the contrary the plaintiffs in error obtained, in the return of the papers, more than they were entitled to. The court should have impounded such of them as were relevant to the investigation being conducted by the grand jury.

V.

A CORPORATION, EITHER STATE OR FEDERAL, CAN NOT PLEAD IMMUNITY FROM SELF-INCRIMINATING TESTIMONY UNDER THE FIFTH AMENDMENT AS TO ITS BOOKS AND PAPERS.

(*a*) *This is settled by the decisions of this court.*

The plaintiffs in error claim with much earnestness that the question whether a State corporation can as to its books and papers claim the privilege against testimonial self-incrimination

granted by the fifth amendment as to a charge of defrauding, or conspiring to defraud the United States has never been decided by this court in a case where the issue required a decision upon this precise point. It is necessary, therefore, to review the decisions of this court dealing with the matter.

In *Hale* v. *Henkel*, 201 U. S. 43, a subpœna duces tecum was served upon an officer of a corporation to produce certain books, etc., belonging to it and in his custody as such officer, and he refused to produce them on the ground that to produce them might tend to incriminate him. Being imprisoned for contempt, he asserted also in his petition for a habeas corpus that to produce said papers would violate the constitutional rights of the corporation. (Rec. No. 340, Oct. Term, 1905, p. 4.) His counsel in this court argued at length (Brief, pp. 74 to 87) that to compel him to produce the documents in question was only an indirect method of compelling a corporation to incriminate itself, since a corporation can only testify or make discovery through an agent, and that a corporation was entitled to the constitutional privilege not to be compelled to testify against itself. They urged most of the reasons and cited most of the authorities relied upon by counsel for plaintiffs in error in the case at bar. It was in regard to the issue thus raised, presented, and argued that this court rendered the following decision (201 U. S. 74, 75):

> If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the

books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New

> Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

We submit that the above is not, as counsel claim, a dictum. A corporation can only speak and act through an agent such as Hale. Moreover, if Hale was guilty of any crime it was only as officer of the corporation, which would necessarily be entangled in the same web with him. When therefore he asserted the constitutional privileges, not only of himself, but also of the corporation, it was the judicial duty of this court to decide upon the latter as well as the former and thus dispose of the entire matter.

As an illustration of the confusion induced by any other course reference may be made to the case of *Davies* v. *Lincoln National Bank*, 4 N. Y. Supp. 373. This case is twice cited by counsel for plaintiffs in error in the case at bar (Brief pp. 48 and 56) to the point that a corporation may claim the privilege against self-incrimination. The proceeding, however, was against the president of the bank and the court held that this was merely an indirect method of compelling discovery from the bank itself, since it could only be examined through its officers. Counsel therefore is in the dilemma of citing a case as authority in their favor where the process was against the officer, but denying the authority of *Hale* v. *Henkel* because the process was not against the corporation.

However, in the immediately following case of *Nelson*, 201 U. S. 92, the difficulties conjured up by counsel seem to be met, if that be possible. Here *subpœnas duces tecum* were served on certain persons individually and as officers of certain corporations (*Alexander* v. *United States*, 201 U. S. 120) to testify before a commissioner. They appeared and were asked to produce the books. The attorney for the corporations then made the following statement (201 U. S. 102):

> Question. Do you refuse, Mr. Nelson, to produce the books?
>
> Mr. FLANDERS. As I said before, you may assume for the purposes of these questions that the books and all the papers called for are

present in court, but on behalf of the Hennepin Paper Co. and the witness and the General Paper Co. I decline to submit those to the inspection of the Government counsel.

Mr. KELLOGG. Or to allow them or any part of them to be put in evidence, Mr. Flanders?

Mr. FLANDERS. Yes.

A rule *nisi* for contempt having been issued, Nelson answered that he was the president of the Hennepin Co. and a director of the General Paper Co.; "that said Hennepin Paper Co. and said General Paper Co. have objected and do object * * * to the production of said books and papers * * *." The second ground of such objection was stated to be that to produce the papers would violate the constitutional rights of the two paper companies secured to them by the fifth amendment (201 U. S. 93, 94). Judge, now Justice, Van Deventer, who tried the case below, thought that the right of a corporation to claim immunity from self-incrimination was properly before him. He held that if the corporation had said right, it was also entitled to the immunity granted by the antitrust act; and that, if it did not have the right, it would, of course, have to produce the papers in question. (Rec. No. 490, October term, 1905, pp. 284, 285.) The point being thus squarely raised before this court, it said (201 U. S. 116):

> This contention asserts rights personal to the plaintiff, and rights of the corporation defendants in the suit. The basis of both rights is the fourth and fifth amendments

> to the Constitution of the United States. * * *
>
> The extent of the immunity and its application to corporations was considered in *Hale* v. *Henkel* and *McAlister* v. *Henkel*, and decided adversely to the contention of plaintiffs in error.

In *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, the defendant corporation itself objected to the introduction of evidence relating to the seizure of certain pictures on the ground, *inter alia*, that the evidence tended to incriminate it. The court said (207 U. S. 302):

> We think we need only refer in this connection to *Adams* v. *New York*, 192 U. S. 585, 597, and *Hale* v. *Henkel*, 201 U. S. 43.

The reference to *Hale* v. *Henkel* can only mean that this court supposed the principle there laid down applicable to a case where the corporation itself made the objection.

In *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, a statute of the State provided for the production before a grand jury of books, etc., of corporations doing business in the State, whether organized under its laws or not, and whether the books, etc., were within the State or not. A notice was served on the Rendering Co., a corporation, not organized under the laws of Vermont, to produce books, etc., The company refused to comply on the ground that to produce the documents would tend to incriminate it, and was punished for contempt. This court, assuming for the purposes of the case that violation of the

privilege against self-incrimination would be a violation of the due process of law protected by the fourteenth amendment (207 U. S. 553), held that there was no violation of the rights of the corporation in so far as the fifth amendment was concerned. The court said (207 U. S. 552):

> There can surely be no illegality in providing that a corporation doing business in the State and protected by its power may be compelled to produce before a tribunal of the State material evidence in the shape of books or papers kept by it in the State, and which are in its custody and control, although for the moment outside the borders of the State. The statute is in no sense a provision as to how the company shall perform its duties and obligations in other States. It directs the company doing business in the State and present therein, by its officers or some of them, to do something which it is entirely competent to do, the purpose of which is to enable the tribunal making the investigation under a State statute to perform its duty.

In *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, an order was made under the authority of a State statute requiring a corporation to produce books, etc. The corporation, through its attorneys, refused to comply on the ground, *inter alia*, that the order constituted an unreasonable search and seizure (212 U. S. 338, 339). In disposing of this contention the court said (212 U. S. 347–349):

> It is insisted that the order to produce was so general and indefinite as to amount to an

unreasonable search and seizure, and consequently was wanting in due process of law. But conceding, for the sake of argument only and not so deciding, that the due process clause of the fourteenth amendment embraces in its generic terms a prohibition against unreasonable searches and seizures, a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined in view of the visitorial powers of a State over corporations doing business within its borders and the right of the State to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employés of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the State, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the *Consolidated Rendering Co. case*, because the books of the Hammond

Co., which were called for, may not have been at any time kept within the State of Arkansas.

Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the State asserted. As these subjects were within the scope of the visitorial power of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Co.* v. *Vermont*, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater includes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. See *Hale* v. *Henkel*, 201 U. S. 43. If, as was in that case decided, the power of visitation could be exercised, even though it might lead to the production of incriminating evidence merely because the order to produce in this case called for evidence in the possession of the corporation relevant to its defense did not affect the validity of the order.

In *Wilson* v. *United States*, 221 U. S. 361, a *subpœna duces tecum* was issued directed to a corporation

and served upon Wilson, its president, as custodian of the books desired. He claimed that their production would tend to incriminate him. In overruling his claim the court said (221 U. S. 382, 383):

> What then is the status of the books and papers of a corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial

> power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.
>
> This view, and the reasons which support it, have so recently been stated by this court in the case of *Hale* v. *Henkel*, *supra*, that it is unnecessary to do more than to refer to what was there said.

It is claimed that this statement is not authoritative because Wilson was asserting the privilege on behalf of himself and not on behalf of the corporation, but, as has been stated above, the acts of Wilson as president of the corporation were so inextricably bound up with the action of the corporation itself as to make it fairly necessary to determine whether the corporation itself could claim the privilege as against such documents. If it could, there would be strong reason for holding that its president could make the same claim as to his acts done in his official capacity.

American Lithographic Co. v. *Werckmeister*, 221 U. S. 603, was an action for penalties under the copyright law. The production of certain books of the company was compelled under a *subpœna duces tecum*. In regard to this the court said (221 U. S. 611):

> In the present case the question, therefore, must be whether under the fourth and fifth amendments of the Constitution of the United States the defendant company, as it contends, was entitled to object to the admission in evidence of the entries from its books. As to this, we need only refer to the recent decisions

of this court. *Hale* v. *Henkel*, 201 U. S. 43; *Nelson* v. *United States*, *supra*; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361.

Baltimore & Ohio Railroad Co. v. *Interstate Commerce Commission*, 221 U. S. 612, was a bill in equity to enjoin certain orders of the commission requiring reports from the carriers regarding employees permitted to remain on duty an unlawful period, on the ground, *inter alia*, that to render such reports might tend to incriminate the corporation. In disposing of this claim the court said (221 U. S. 622, 623):

> Nor can the corporation plead a privilege against self-crimination under the fifth amendment. *Hale* v. *Henkel*, 201 U. S. 74, 75; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361. With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which can not be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate action, where these are ordered by the commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and can not claim a personal privilege in hostility to the requirement. *Wilson* v. *United States*, *supra*.

In *Wheeler* v. *United States*, 226 U. S. 478, 489, it is said of *Wilson's case, supra:*

> In that case it was held that there was no unreasonable search or seizure where the officer of a corporation, whose guilt of an offense against the laws of the United States was under investigation, was compelled to produce books and papers of the corporation of which he was president, because as against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but the books of the corporation, which were not within the protection given to the private books and papers of an individual.

These decisions of this court have been thus referred to and quoted from at length because, in our judgment, such a statement of them is sufficient in itself to demonstrate the error of counsel's claim that this court has never denied the right of a corporation to plead self-incrimination where the point was squarely raised by the corporation itself on such a state of facts as is disclosed in the case at bar. It is perfectly clear that in most, if not all, of these cases it was necessary, on the record presented to this court, to authoritatively decide the precise question whether a corporation can plead the privilege against self-incrimination granted by the fifth amendment, and that the court, so understanding it, did authoritatively decide it adversely to the right.

This has been the uniform view of the lower Federal courts, so far as we have been able to discover. *International Mining Co.* v. *Pennsylvania Railroad Co.*, 152 Fed. 557 (E. Dist. Pa.); *United States* v. *Philadelphia & Reading Railway Co.*, 225 Fed. 301, 304, 305 (*ibid.*); *Orvig, etc.*, v. *New York & Bermudez Co.*, 229 Fed. 293 (E. Dist. N. Y.); *In re Rosenwasser Bros.*, 254 Fed. 171, 173 (*ibid.*); *New York Central Railroad* v. *United States*, 165 Fed. 833, 843 (C. C. A. 1st). The matter is fully discussed by Judge Veeder in *Orvig, etc.*, v. *New York & Bermudez Co., supra*. *United States* v. *Philadelphia & Reading Railway Co., supra*, is relied on and quoted from by counsel for plaintiffs in error on page 64 of their brief. The quotation gives an erroneous impression of the decision, since Judge Thompson went on immediately to state that, as he understood *Hale* v. *Henkel* and the other cases, the right guaranteed by the fifth amendment is not extended to corporations.

(*b*) *Claim that the decisions of this court denying to State corporations immunity from self-incrimination only apply to cases where the Federal Government has "visitatorial" powers, or, if not, are unsound.*

(1) Counsel for plaintiffs in error claim that even if the point as to immunity of corporations from self-incrimination was squarely before the court in the cases hereinbefore cited, the ruling was confined to cases where the corporations were exercising something in the nature of a Federal franchise, such as, e. g., engaging in interstate commerce or the use of

the mails, and were abusing or exceeding such franchise so that the "visitatorial" power of the Federal Government could be exerted. It is argued that, therefore, the said decisions do not apply to the case at bar, since the Lumber Co., instead of being charged with abuse of a Federal franchise, is only charged with, or is only afraid of incriminating itself of defrauding the United States. How counsel know this is not apparent, since the subpoenas did not indicate any charge against the corporation at all. Waiving this, we submit that counsel take an entirely too narrow view of the scope of the decisions referred to. Speaking technically, "visitation" only applies to ecclesiastical or eleemosynary corporations. (See *Guthrie* v. *Harkness*, 199 U. S. 148, 157, 158, where the content of the term is considered.) But even at the common law the term was extended to cover ordinary private corporations and to subject them to the laws of the land. In Halsbury's Laws of England, vol. 8, p. 355, it is said of "external government or visitation" of corporations:

> Corporations constituted for public purposes or for trade are governed by the ordinary laws of the realm, and the court may examine into and adjudicate upon the validity of any private regulations or constitutions or the execution thereof by such a corporation. They are also subject to the control of various Government departments.

For this statement reliance is partly placed on Lord Holt's opinion in *Phillips* v. *Bury*, 2 T. R. 345,

352, where it is in effect said that noneleemosynary corporations are subject through the courts to the laws of the land. To the same effect is Judge Story's opinion in the *Dartmouth College Case*, 4 Wheat. 518, 675, 676, where he says that an eleemosynary, like every other corporation, is subject to the law of the land and to the inquisition of a court of chancery, not as a visitor, but as exercising its general equitable jurisdiction. The court of chancery is in such case merely the proper arm of the State, and where the matter involved in the corporate activities is not a breach of trust but a violation of the criminal laws the principle stated involves necessarily the exercise of this same power of examination by the courts administering criminal justice. In brief, corporations being the creatures of the State are subject at any time to investigation by it to see whether they are observing its laws. To allow them to defeat such investigation by the plea that to permit it would prove them guilty of violating those very laws would be a contradiction in terms. Indeed the making of such a plea would be the very reason in law for requiring the investigation.

Such were the broad principles laid down by this court in *Hale* v. *Henkel* and *Wilson's case*. The very language of the court in these and the other cases referred to in this brief shows beyond any doubt that the decisions were not rested on the particular, special right of the State to inquire into the abuse of franchises granted by itself, through proceedings in

the nature of quo warranto. In *Hale* v. *Henkel* it is said:

> It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority *to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws.* Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. *The powers of the General Government in this particular, in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations.* (Italics ours.)

This is further developed in *Wilson's case*, as follows:

> Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, *and in*

the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress. (Italics ours.)

The nature of the supposed criminality of the corporations in these cases conclusively shows the error of counsel's claim. In the former it was violation of a law regulating interstate commerce, in the latter of a law regulating the use of the mails. It may be that Congress could grant charters to carry on interstate commerce and to use the mails, as it could grant a charter to the United States Bank; and it may be that the Federal courts could appoint visitors to see whether such corporations were complying with the terms of such charters in their by-laws, or in their external behavior. Congress, however, has never done any such thing, and consequently it is impossible to explain *Hale* v. *Henkel* and the other cases on this ground. The reference to interstate commerce in the *Hale case* is made merely to show that Federal functions were involved, not to distinguish the Federal power over that matter from the Federal power over any other matter intrusted to the United States by the Constitution. To say that the power to compel discovery from a corporation in regard to interstate commerce or as to using the mails is greater than the power to compel discovery from it as to larceny of property of the United States, defrauding the United States, bribing Federal officials, etc., etc., is to say that the tail wags the dog. It was subjection to *all* the constitutional laws of the United States which this court had in mind in its decisions.

(2) Counsel stress the point that the franchise of the Lumber Company to do business was granted by the State of New York and that therefore the Federal Government could have no power to compel discovery from it based upon the right of "visitation," such right residing solely in the State which has statutes defining and regulating it. This claim really seems to come to this, viz, that the decisions in *Hale* v. *Henkel* and the other cases are wrong and should be overruled—a claim which, we suppose, will not be taken very seriously. The argument itself might have sounded well enough in the mouth of Calhoun but has an archaic sound at the present day. In *Tennessee* v. *Davis*, 100 U. S. 257, 262, Justice Strong, delivering the opinion of the court, said:

> The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

Applying this principle the court held in the *Corporation Tax Cases*, 220 U. S. 107, 152–157, that the power of taxation granted to the United States by the Constitution extended over the whole country irrespective of State lines and authorized the levy of

an excise tax upon the doing of business by corporations whose charter to do such business came from the several States. The United States is not foreign to the several States in the sense that it cannot effectively execute its laws as to corporations doing business under State charters. The *Consolidated Rendering Co. Case, supra*, may also be referred to, since, if the State of Vermont could compel discovery from a corporation, though chartered by another State, because it was doing business within the borders of Vermont, *a fortiori* the United States may compel discovery of a State corporation under the same circumstances and for the same reasons. It is the amenability of a corporation to the laws of the United States that is the test, not the source of its charter.

VI.

CLAIM THAT THE MATTER IS GOVERNED BY THE COMMON LAW, AND THAT DUE PROCESS OF LAW HAS BEEN DENIED.

(*a*) It is argued by counsel that even if the Lumber Co. be not entitled to claim immunity from self-incrimination *under the fifth amendment*, it may claim the same immunity *as granted to it by the common law*, since no Federal statute has taken away this common-law right. Hence the action of the court below denied it due process of law. (Brief, p. 63.)

To this it may be answered:

(1) The fifth amendment is coextensive with the common law. What the latter granted or grants, the amendment secures, no more, no less. *State* v.

Quarles, 13 Ark. 307, 311; *State* v. *Fuller*, 34 Mont. 12, 19. Therefore, when this court decided that a corporation has no constitutional immunity from self-incrimination, it necessarily decided that it had no common law immunity. This is clearly brought out in *Wilson's case* (221 U. S. 386), where the court cited the English cases relied on by counsel (brief p. 47) and held them not controlling.[1]

(2) In *Twining* v. *New Jersey*, 211 U. S. 78, 99–114, the question whether the privilege against self-incrimination is included in the legal content of the term "due process of law," mooted in *Adams* v. *New York* and the *Consolidated Rendering Company case*, was fully considered, and it was held that it was not. The claim of counsel is, therefore, no longer open in this court.

VII.

CLAIM THAT THE SUBPOENAS COMPEL THE CORPORATION TO INCRIMINATE ITSELF BECAUSE BASED ON INFORMATION ACQUIRED THROUGH THE ILLEGAL SEIZURE AND DETENTION.

(*a*) What has been said above is, in substance, a sufficient answer to this claim. If a corporation is not entitled at any time or under any circumstances to plead compulsory self-incrimination as to the books and papers, if it is not entitled as to such books and

[1] In the principal one, *Granatelli's case*, 7 State Trials n. s. 979, 986, 987, the plea of the witness was that to produce would incriminate *him*. Secondary evidence of the document was held competent over objection that it was derived from possession wrongfully obtained.

papers to the privileges guaranteed by the fifth amendment, then it can not indirectly obtain the benefit of this amendment by objecting to the manner in which the Government got its information resulting in perfectly lawful compulsory production. The case does not differ in the least from one where the witness does not plead self-incrimination, as to which see *Blair* v. *United States*, 250 U. S. 273. Such a witness could be compelled to produce relevant testimony, though the knowledge that he had it and of its precise extent had been derived from illegal acts of public officials. As to this there can be no possible doubt.

(*b*) Since, however, counsel argue at length that to sustain the subpoenas in the present case would be to nullify the fifth amendment and rely confidently upon the decision of this court in *Weeks* v. *United States*, 232 U. S. 383, and on the decision of the Court of Appeals for the Second Circuit in *Flagg* v. *United States*, 233 Fed. 481, as showing this, a brief statement of these and other cases may be pardoned.

(*c*) At the outset we desire to join counsel for plaintiffs in error in sincere and severe condemnation of the proceedings of the Federal officials in the execution of the first subpoenas. The Department of Justice never has approved of or condoned such lawless action, and it is to be hoped it never will. We can not, however, agree with counsel that such illegal action of subordinate public officials should forever prevent the United States from

securing by legal process relevant testimony to a violation of its laws where no right under the fifth amendment can be successfully set up. We call attention to the following language of Judge Veeder, concurring in the *Flagg Case* (233 Fed. 487):

> In the result, however, the defendant is released, not because he is innocent, but because a postal inspector secured without instead of with a warrant the proofs of his guilt. The sins of the postal inspector, for which the person aggrieved has not chosen to seek redress or punishment, are visited upon the only party whose claim to consideration is unimpeachable, namely, the United States. Moreover, this procedure places the administration of the criminal law entirely at the mercy of subordinate agents of the Government. Whether actuated by zeal, caprice, or corruption, they have it in their power to confer by their illegal act immunity from successful prosecution.

(*d*) In *Adams* v. *New York*, 192 U. S. 585, the private papers of the defendant were seized by officers having a search warrant, not broad enough, however, to cover them. The defendant never made any objection to the seizure or detention of them, but objected at the trial to the receipt of them as evidence both because there had been an unreasonable search and seizure and because they tended to incriminate him. This court said in regard to these claims (192 U. S. 597, 598):

> The Supreme Court of the State of New York, before which the defendant was tried,

> was not called upon to issue process or make any order calling for the production of the private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them.

In *Weeks* v. *United States*, 232 U. S. 383, certain private papers of the defendant were unlawfully seized at his residence by municipal police and the United States marshal, and came into the custody of the United States attorney. The defendant, before trial, petitioned the District Court for an order on the United States attorney to return them. This was denied, and subsequently the papers were admitted in evidence. This court reversed the judgment of conviction, saying (232 U. S. 398):

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United

> States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved *in the order refusing the application* a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. *In holding them* and permitting their use upon the trial, we think prejudicial error was committed. (Italics ours.)

It is entirely clear from the opinion of the court that there was no intention to overrule the *Adams case*, which is dealt with at length and distinguished. Moreover, the *Adams case* is coupled with the *Weeks case* as authority to the same point in *Schenck* v. *United States*, 249 U. S. 47, 50. This court clearly has no idea that they are conflicting. The distinction between them is plain and depends on the principle that in order to bring a case within the fifth amendment the testimony tending to incriminate must be compelled by some warrant of law. "A party is privileged from producing the evidence but not from its production." (*Johnson* v. *United States*, 228 U. S. 457, 458.) "The notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the fifth amendment is plainly unsound." (*Schenck* v. *United States*, 249 U. S. 47, 50.) In the *Adams case*, as the court pointed out, there had been no action by the trial court directed to the seizure or detention of the papers; there was, therefore, no objection made to

any order of the court to that effect, but only to their use as evidence. In the *Weeks case*, on the contrary, there was a denial by the court of a petition for the return of the papers. This amounted to the issuance by the court of a *subpoena duces tecum* for them (see *Kelly* v. *Griffin, ubi supra*), or to an impounding order, and hence to compulsory process for their production as testimony. It was for this reason, viz, denial of the petition for return of the papers, that this court reversed the judgment, and not because of their reception as evidence. And this seems to be the view taken by all the lower Federal courts who have had occasion to consider the matter except the Court of Appeals of the second circuit. (See e. g. *Lyman* v. *United States*, 241 Fed. 945, 948, 949, C. C. A. 9th; *Rice* v. *United States*, 251 Fed. 778, 781, 782, C. C. A. 1st; *Laughter* v. *United States*, 259 Fed. 94, 98, C. C. A. 6th.) The Court of Appeals for the second circuit seems to think that the *Weeks case* goes further than stated above. (See *Flagg* v. *United States*, 233 Fed. 481, and *Fitter* v. *United States*, 258 Fed. 567, 574.) In the *Flagg case*, as in the *Weeks case*, the defendant's papers were seized without any warrant of law and came into the custody of the Federal officials. No application, however, was ever made to the court for the return of the papers apparently, though they were actually returned before trial. It would seem that the defendant was convicted on evidence procured in some way from the seized papers and that the court reversed the judgment for this reason. The majority distinguished the *Adams case* on the

ground that in that case there was a legal warrant which was merely executed in an illegal manner, while in the case before them there was no warrant at all, a fact, we submit, making the *Adams case* peculiarly applicable. Judge Veeder, concurring, thought that the *Weeks case* had overrruled the *Adams case.* It seems to us that the Court of Appeals incorrectly interpreted the *Weeks case* and consequently reached a wrong conclusion, so that the reliance placed by counsel in the case at bar on the *Flagg case* is not well founded. To hold that it is error in a court to retain custody of papers as to which the owner is entitled to the protection of the fifth amendment does not involve a holding that secondary evidence can not be received because made possible by the unlawful examination of such papers.

However that may be, the *Flagg case* has no bearing on the case at bar because, as has been already stated, a corporation is not entitled in respect of its books and papers to the benefits of the fifth amendment, and therefore the very condition *sine qua non* of the decision in the *Flagg case* does not exist in the case at bar. No court would ever hold that a witness, not entitled or not desiring to plead the privilege against self-incrimination, could refuse to testify or to produce papers because knowledge upon the subject had come to prosecuting officers through illegal sources. Consequently in *Linn* v. *United States,* 251 Fed. 476 (a case apparently overlooked by counsel), the Court of Appeals for the Second Circuit said (251 Fed. 480):

> But counsel urged upon us at the argument that this case should be governed by the

principle applied by this court in *Flagg* v. *United States*, 233 Fed. 481, 147 C. C. A. 367 (1916). In that case, as in this, the defendant was indicted for devising a scheme to defraud and using the mails in furtherance thereof; and in that case, as in this, the books and papers at the accused's place of business were seized and taken to the Federal building, where they were examined by the Federal authorities, who ultimately, upon demand having been made, returned them to his office. We held in that case that a conviction based upon evidence procured from the books and papers so taken without pretense of legal authority could not be sustained, and we placed our decision upon the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant of pretense of legal authority. The wrong done in the seizure of the books was not cured by the idle ceremony of returning them after the authorities of the United States had obtained their desired information.

The similarity of the two cases has been noted. It remains simply to point out the dissimilarity between the two cases, a dissimilarity so great as to make it impossible to apply the principle involved in that case to the facts of this one. The books and papers seized in the *Flagg case* were the private books and papers of an individual. The books and papers in this case were the books and papers of a corporation. While a person is privileged from producing his books in a prosecution

> against himself, a corporation is not privileged from producing its papers and books, even though they incriminate the officer who produces them. The distinction is clearly pointed out in *Wilson* v. *United States, supra.*

The same ruling was in substance made by the Court of Appeals for the First Circuit in *New York Central Railroad* v. *United States,* 165 Fed. 833, where it was held that a demand for papers could be made at the trial upon the attorney for the company because the latter was not entitled to plead self-incrimination.

We repeat, therefore, that in the case at bar the Lumber Company, not being entitled to object under the fifth amendment to the use as evidence of the papers in question, can not object to lawful, sufficiently definite subpœnas to produce them because the knowledge of their existence and of their contents was derived from a prior illegal seizure. To sanction such objection would be to offer a premium to a witness who could successfully conceal from the State the possession of relevant evidence to the violation of its criminal laws.

SUMMARY.

To sum up:

(1) None of the points made by plaintiffs in error can be raised by a bare refusal to obey the subpœnas without any submission to the jurisdiction of the court, except that claiming an invalidity in their service.

(2) The subpœnas were validly served, but if not, the company waived any such defect by failing to raise the point on the motion to quash.

(3) The subpœnas do not, on their face, constitute an unreasonable search and seizure, being sufficiently specific and free from oppressive features.

(4) Being thus valid, in and of themselves, they are not transformed into an unreasonable search and seizure, because made possible and effective through knowledge derived from a prior unreasonable search and seizure.

(5) A corporation is not entitled to claim as to its books and papers the privilege against compulsory testimony granted by the fifth amendment.

(6) That being so, it is immaterial that the compulsory production of such books and papers is made possible and effective through knowledge gained by a prior illegal search and seizure.

CONCLUSION.

While we have thought it the better course, in view of the earnestness and apparent confidence of counsel, to discuss the questions said to be involved in the case at bar at what is probably undue length, we do not at all recede from the position assumed by the motion to dismiss, viz, that the constitutional claims of the planitiffs in error have been so often and so clearly disposed of adversely by this court as to make them at this time frivolous. Indeed, we can not but feel that the real purpose of this writ of error is to delay the grand jury proceedings. We refer the court to the language of Judge Hazel in the court below (R. 106):

> In my view of it, after reading these cases, to which my attention has been drawn during

these hearings, a corporation is not immune from giving testimony against itself. A corporation is a creature of the State, and because it is such it can not commit crimes and offenses against the laws of the people of this Nation, and when these offenses are disclosed in its books it can not refuse to surrender them for inquiry and investigation by the grand jury. That has been my opinion regarding this matter from the very beginning, and since I deem this question settled by the decisions of the Supreme Court a serious doubt is in my mind as to whether an application for a supersedeas is made in good faith. The grand jury is in session now, and has been in session for some time, and its duties are seriously interfered with by the action of the officers of this corporation. From the very beginning this grand jury, I am informed, has been desirous of investigating into the affairs of this corporation for the purpose of ascertaining whether a crime has been committed or not; it has been interfered with from the very beginning and obstacles thrown in its way—the books which it required have been withheld—and I think there is some reason to the argument by the district attorney that this application is not made in good faith.

The writ of error should be dismissed for lack of jurisdiction or the judgment of the lower court affirmed.

R. P. STEWART,
Assistant Attorney General.

W. C. HERRON,
Attorney.

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SILVERTHORNE LUMBER COMPANY, INC., ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 358. Argued December 12, 1919.—Decided January 26, 1920.

The Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books and papers for use in a criminal proceeding against them, when the information upon which the subpœnas were framed was derived by the Government through a previous unconstitutional search and seizure, planned and executed by its officials under color of a void writ; provided the defense of the Amendment be seasonably interposed, and not first raised as a collateral issue at the trial of the indictment. P. 391. *Weeks* v. *United States*, 232 U. S. 383, followed. *Adams* v. *New York*, 192 U. S. 585, distinguished.

The rights of a corporation against unlawful search and seizure are to be protected even if it be not protected by the Fifth Amendment from compulsory production of incriminating documents. P. 392.

Reversed.

THE case is stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Henry W. Killeen*, *Mr. James O. Moore*, *Mr. Frederic D. McKenney* and *Mr. Myer Cohen* were on the briefs, for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The question whether the subpœnas authorized an unreasonable search and seizure is separate from the question whether obedience would unconstitutionally compel self-incrimination. The Fourth and Fifth Amendments are distinct. *Hale* v. *Henkel*, 201 U. S. 43, 71, 72; *Wilson* v. *United States*, 221 U. S. 361, 371.

The subpœnas are as specific as was reasonably possible. A subpœna *duces tecum*, like a search warrant, must necessarily be, to some extent, a demand for discovery. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 553, 554; *Wilson* v. *United States*, *supra*, 376; *Wheeler* v. *United States*, 226 U. S. 478. Whether the terms of a subpœna violate the requirements of the Fourth Amendment can not be determined by its effect upon business convenience of the corporation.

The validity of an arrest or seizure is to be determined by the condition obtaining when objection is made. If then valid, the fact that a prior arrest or seizure, effective in bringing about the valid action, was entirely or partially illegal is immaterial and tenders a collateral issue. This rule is firmly established. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310; *Wood* v. *United States*, 16 Pet. 342, 359; *Mahon* v. *Justice*, 127 U. S. 700, 708; *Pettibone* v. *Nichols*, 203 U. S. 192, 216, 217; *Kelly* v. *Griffin*, 241 U. S. 6, 12, 13.

Where liberty of the person is involved, a valid detention is not affected by prior illegal arrests even though the present detention is made possible solely through them. Papers and books are not entitled to any greater immunity. *Adams* v. *New York*, 176 N. Y. 351, 358; *s. c.* 192 U. S. 585, 594–598; *Perlman Rim Corporation* v. *Firestone Tire Co.*, 244 Fed. Rep. 304; affd. 247 U. S. 7, 15; *United States* v. *Hart*, 214 Fed. Rep. 655; *Stroud* v. *United States*, 251 U. S. 15; *Kerrch* v. *United States*, 171 Fed. Rep. 366; *Johnson* v. *United States*, 228 U. S. 457; *United States* v. *Wilson*, 163 Fed. Rep. 338; *New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833; *United States* v. *McHie*, 196 Fed. Rep. 586; *In re Rosenwasser Bros.*, 254 Fed. Rep. 171.

Certain decisions, where a motion to return papers was granted or an impounding order refused, can all, with one exception, be explained upon the ground that the

papers would not have been admissible in evidence as against a claim of immunity under the Fifth Amendment, and, hence, to bring in or retain them would have been idle. *United States* v. *Mills*, 185 Fed. Rep. 318; *United States* v. *McHie*, 194 Fed. Rep. 894; *United States* v. *Mounday*, 208 Fed. Rep. 186; *United States* v. *Jones*, 230 Fed. Rep. 262; *United States* v. *Abrams*, 230 U. S. 313; *United States* v. *Friedberg*, 233 Fed. Rep. 313; *Veeder* v. *United States*, 252 Fed. Rep. 414; *In re Marx*, 255 Fed. Rep. 344. The one exception is the case of *In re Tri-State Coal & Coke Co.*, 253 Fed. Rep. 605, where the court clearly overlooked the rule that a corporation can not plead immunity from self-incrimination and that therefore the books, etc., in question, in so far as relevant, should have been retained by the court, irrespective of the invalidity of the search warrant.

Weeks v. *United States*, 232 U. S. 383, is, in so far as the Fourth Amendment is concerned, a case where the trial court should have refused to retain custody of the papers, not because of anything connected with the original unlawful seizure, but because of the defendant's claim of immunity under the Fifth Amendment, the papers being the private papers of an individual seized at his residence. We respectfully submit, therefore, that according to the settled principles of the law the subsequent valid subpœnas issued by the court in the case at bar were not in any way vitiated or weakened in authority or effect by reason of the prior illegal seizure.

A corporation, either state or federal, can not plead immunity from self-incriminating testimony under the Fifth Amendment as to its books and papers. *Hale* v. *Henkel*, *supra*, 74, 75; *Nelson* v. *United States*, 201 U. S. 92; *Alexander* v. *United States*, 201 U. S. 117; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 347–349; *Wilson* v. *United States*, *supra*, 382, 383; *American Lithographic*

Co. v. *Werckmeister*, 221 U. S. 603, 611; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.*, 221 U. S. 612, 622, 623; *Wheeler* v. *United States*, *supra*, 489.

This has been the uniform rule of the lower federal courts, so far as we have been able to discover. *International Mining Co.* v. *Pennsylvania R. R. Co.*, 152 Fed. Rep. 557; *United States* v. *Philadelphia & Reading Ry. Co.*, 225 Fed. Rep. 301; *Orvig* v. *New York & Bermudez Co.*, 229 Fed. Rep. 293; *In re Rosenwasser Bros.*, *supra*; *New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833. The decisions were not rested on the special right of the State to inquire into the abuse of franchises granted by itself, through proceedings in the nature of *quo warranto*. The United States is not foreign to the several States in the sense that it cannot effectively execute its laws as to corporations doing business under state charters.

The Fifth Amendment is coextensive with the common law. What the latter granted or grants, the Amendment secures, no more, no less. *State* v. *Quarles*, 13 Arkansas, 307, 311; *State* v. *Fuller*, 34 Montana, 12, 19. Therefore, when this court decided that a corporation has no constitutional immunity from self-incrimination, it necessarily decided that it had no common-law immunity. This is clearly brought out in the *Wilson Case*, 221 U. S. 386, where the court cited the English cases and held them not controlling.

In *Twining* v. *New Jersey*, 211 U. S. 78, the question whether the privilege against self-incrimination is included in the legal content of the term "due process of law," mooted in *Adams* v. *New York* and the *Consolidated Rendering Co. Case*, was fully considered, and it was held that it was not.

If a corporation is not entitled at any time or under any circumstances to plead compulsory self-incrimination as to the books and papers,—if it is not entitled as to

such books and papers to the privileges guaranteed by the Fifth Amendment,—then it can not indirectly obtain the benefit of this Amendment by objecting to the manner in which the Government got its information resulting in perfectly lawful compulsory production. The case does not differ from one where the witness does not plead self-incrimination, as to which see *Blair* v. *United States*, 250 U. S. 273. Such a witness could be compelled to produce relevant testimony, though the knowledge that he had it and of its precise extent had been derived from illegal acts of public officials.

Illegal action of subordinate public officials can not forever prevent the United States from securing by legal process relevant evidence of a violation of its laws where no right under the Fifth Amendment can be successfully set up. *Flagg* v. *United States*, 233 Fed. Rep. 481, 487; *Adams* v. *New York*, *supra*, 597, 598. In *Weeks* v. *United States*, *supra*, there was a denial by the court of a petition for the return of the papers. This amounted to the issuance by the court of a subpœna *duces tecum* for them (see *Kelly* v. *Griffin*, *supra*,) or to an impounding order, and hence to compulsory process for their production as evidence. It was for this reason that this court reversed the judgment, and not because of their reception as evidence. And this seems to be the view taken by all the lower federal courts who have had occasion to consider the matter, except the Court of Appeals for the Second Circuit. See, *e. g.*, *Lyman* v. *United States*, 241 Fed. Rep. 945; *Rice* v. *United States*, 251 Fed. Rep. 778; *Laughter* v. *United States*, 259 Fed. Rep. 94; *Flagg* v. *United States*, 233 Fed. Rep. 481; *Fitter* v. *United States*, 258 Fed. Rep. 567. Cf. *Linn* v. *United States*, 251 Fed. Rep. 476, 480; *New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833. The Lumber Company, not being entitled to object under the Fifth Amendment to the use as evidence

of the papers in question, can not object to lawful, sufficiently definite subpœnas to produce them because the knowledge of their existence and of their contents was derived from a prior illegal seizure. To sanction such objection would be to offer a premium to a witness who could successfully conceal from the State the possession of relevant evidence of the violation of its criminal laws.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error brought to reverse a judgment of the District Court fining the Silverthorne Lumber Company two hundred and fifty dollars for contempt of court and ordering Frederick W. Silverthorne to be imprisoned until he should purge himself of a similar contempt. The contempt in question was a refusal to obey subpœnas and an order of Court to produce books and documents of the company before the grand jury to be used in regard to alleged violation of the statutes of the United States by the said Silverthorne and his father. One ground of the refusal was that the order of the Court infringed the rights of the parties under the Fourth Amendment of the Constitution of the United States.

The facts are smple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once. An application was made as soon as might be to the District

Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpœna for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpœnas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpœnas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was

unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. The numerous decisions, like *Adams* v. *New York*, 192 U. S. 585, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in *Weeks* v. *United States*, 232 U. S. 383, 394, 395. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in *Flagg* v. *United States*, 233 Fed. Rep. 481, 483. In *Linn* v. *United States*, 251 Fed. Rep. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE PITNEY dissent.